Supreme Court, U.S.
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No. _____

IN THE

Supreme Court of the United States

CITIZEN POWER, INC., AND
AMERICAN PUBLIC POWER ASSOCIATION
Petitioners,

v.

FEDERAL ENERGY REGULATORY COMMISSION

On Petition for Writ of Certiorari to the United States Court of Appeals for the D.C. Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

This appeal concerns Federal Power Act ("FPA") Section 203, 16 U.S.C. § 824(b), and its construction by the Federal Energy Regulatory Commission ("FERC") and its predecessor, the Federal Power Commission (collectively, the "agency"). The Table of Authorities gives full citations.

1. When Congress sought to protect the public from uneconomic consolidations of jurisdictional public utility facilities by making their disposition federally reviewable, did it carve out as beyond agency reach the generating facilities that produce electric energy for wholesale-level sales in interstate commerce ("interstate generators")?

2. Did the D.C. Circuit err when it gave *Chevron* deference to a statutory construction that reversed, without acknowledging, the enactment-era reading that was followed by both the agency and the Second Circuit in *Hartford,* commended by the Supreme Court in *Connecticut,* adopted by the D.C. Circuit itself in *Mississippi Industries,* and relied upon by the Supreme Court in *Mississippi*?

3. Did the D.C. Circuit err when it concluded that rather than requiring federal review for dispositions of all substantial facilities made jurisdictional by FPA § 201(b), the FPA would require a further, generation-specific, jurisdictional provision located within § 203 itself before disposition review could reach interstate generators?

PARTIES TO THE PROCEEDING

Parties before the United States Court of Appeals for the District of Columbia Circuit ("D.C. Circuit") were:

Petitioners: Citizen Power, Inc., and American Public Power Association ("APPA")

Respondent: Federal Energy Regulatory Commission

Intervenors: Duquesne Light Co. and FirstEnergy Corp.

Citizen Power, Inc. is a non profit, research, education and advocacy organization that seeks to advance the interests of utility consumers in Pennsylvania and Ohio through participation in state and national regulatory proceedings. It has no parent companies, and no publicly-held company has a 10% or greater ownership interest in it.

APPA is the national service organization representing the interests of the nation's approximately 2000 locally owned, locally controlled, not-for-profit electric utility entities of government — municipalities, counties, public utility districts, and an occasional state government throughout the United States. Approximately 1,870 of these systems are currently owned by cities and municipal governments that control their day-to-day operations. Collectively, public power delivers 15 percent of all kilowatt-hour sales to ultimate customers in the United States. Some of these electric utility entities and some of the governments have issued debt securities held by the general public. The association has no shareholders. The association is the sole shareholder of a for-profit subsidiary, Public Power Inc., which is the majority (65%) owner of Hometown Connections International, LLC. Neither Public Power Inc. nor Hometown Connections International, LLC have issued

publicly held debt or equity. Hometown Connections International, LLC holds a 37.5 per cent interest in a joint venture, UtilityFrontier.com, LLC, which has no publicly owned equity or debt.

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JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1254(1). The D.C. Circuit, which had jurisdiction pursuant to 16 U.S.C. § 825*l*(b), issued its judgment on April 25, 2002 but stayed its mandate pending rehearing. A petition seeking rehearing or rehearing en banc was filed timely on June 10, 2002, and denied on June 21, 2002. The mandate issued on July 9, 2002.

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Sections 201, 202, 203, 205, 206, 207 of the Federal Power Act ("FPA"), 16 U.S.C. §§ 824, 824a, 824b, 824d, 824e, and 824f, are reprinted in Appendix D. 18 C.F.R. Part 33 and 18 C.F.R. §35.27(a) are reprinted in Appendix E.

STATEMENT OF THE CASE

This appeal involves an unresolved and increasingly important discrepancy in construing Federal Power Act ("FPA") Part II. Part II is central to regulating the nation's economic life, and begins with a Congressional declaration that "Federal regulation of matters relating to generation to the extent provided ... is necessary in the public interest." Under the statutory construction embraced by this Court, by the Second Circuit, by the D.C. Circuit in a prior decision, and by the agency when the FPA was fresh, the agency has jurisdiction to assert as to public utilities' interstate generation all of the specific powers delineated in Part II. Thus, when a public utility sells, leases, or otherwise disposes of an interstate generator, FERC has § 203 authority to review the transfer's effects on electricity markets and the national public interest therein. Under the statutory construction contained in the abbreviated agency order and unpublished D.C. Circuit Judgment below, however, the agency has jurisdiction to assert as to such generation only those Part II powers that are deemed to contain a further specific grant of jurisdiction over generation. Thus, the D.C. Circuit found that transfers limited to interstate generators are not subject to federal agency review.

Congress enacted Federal Power Act Parts II and III in 1935, as a complement to the Public Utility Holding Company Act governing utility business structures. Shortly thereafter, a Commission that Justice Douglas characterized as "intimately familiar with the background and history of

the Act"[1] asserted jurisdiction over interstate generating facilities under § 201(b), and with it the jurisdiction to subject those facilities' possessors to the specific regulatory authorities provided in the Act's succeeding subsections. *Hartford Electric Light Co.*, 2 F.P.C. 359, 366-67 (1941). Hartford had claimed it was not a public utility because it owned only generation and local distribution facilities, which, it argued, were not jurisdictional to the Commission. The Commission (*id.* at 366-67) disagreed and explained the meaning of § 201(b):

> The first clause in the second sentence....is an all-inclusive provision to the effect that our jurisdiction shall extend over all facilities for transmission or sale of electric energy in interstate commerce. The second clause of the second sentence...is itself subject to further exception, to wit: "except as specifically provided in this Part and the Part next following." In other words, section 201(b), after defining the scope of our regulatory power and jurisdiction, provides that, in respect of certain types of facilities, we shall not exercise our regulatory powers, except as provided in Part II and III of the Act....
>
> We may thus exercise regulatory control over generation facilities ... .

Hartford sought review in the Second Circuit. The Second Circuit affirmed, finding that generating facilities, when used to produce electric energy sold at wholesale in

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[1] *Phillips Petroleum Co. v. Wisconsin*, 347 U.S. 672, 689 (1954) (Douglas, J., dissenting) (discussing a different jurisdictional decision by the same set of early Commissioners).

interstate commerce, are jurisdictional facilities under § 201(b), rendering Hartford a public utility under § 201(e). The Second Circuit further concluded that because interstate generators are jurisdictional under § 201(b), their disposition triggers the Commission's review authority under § 203. *Hartford Elec. Light Co. v. FPC*, 131 F.2d. 953, 955, 961, 963 n. 20 (2d Cir. 1942), *cert. denied,* 319 U.S. 741 (1943).

In *Connecticut Light & Power Co. v. FPC*, 324 U.S. 515 (1945) ("*Connecticut*"), the Supreme Court expressly acknowledged and left intact *Hartford*'s holding about the meaning of FPA § 201. *Id* at 528 n. 6 (approving *Hartford* for "recogniz[ing the] need for the further step of finding that the generating facilities were used as facilities for interstate wholesale sales, and therefore were within section 201(b)"). The D.C. Circuit itself later recognized that *Connecticut* "accepts the proposition that FERC may lawfully assert jurisdiction over matters pertaining to generation where it is found that generation facilities are used as facilities for interstate wholesale sales." *Mississippi Industries v. FERC*, 808 F.2d 1525, 1544 (D.C. Cir.) ("*Mississippi Industries*"), *vacated in other part,* 822 F.2d 1104 (D.C. Cir. 1987).

Although the industry's vertically integrated structure (most public utilities owned generation, transmission, and distribution facilities) generally forestalled questions about the jurisdiction over generation alone, FERC had occasion to address the issue again, and held fast to its *Hartford* position. *Continental Oil Co.*, 18 F.P.C. 296, 299-300 (1957) (construing parallel Natural Gas Act language by following the *Hartford* reasoning that § 201's opening clauses confer jurisdiction over interstate generators).

Decades after *Hartford,* FERC began disclaiming § 203 jurisdiction over generator dispositions on the ground that generators are *not* jurisdictional facilities within the meaning of § 201(b), departing from but not acknowledging *Hartford*'s authoritative interpretation. Each order typically followed a recitation of § 201(b) with a one-sentence assertion that the language means that FERC has *no* jurisdiction over generating facilities.[2] None of these orders reconciled FERC's position with the FPA's references to interstate generating facilities — *e.g.,* the reference in FPA § 206(d), enacted simultaneously with FPA §§ 201(a)-(b) and 203, to "the production [*i.e.,* generation] ... of electric energy by means of facilities under the jurisdiction of the Commission."

Contemporaneously, in a case involving its § 205 rate authority, FERC found that interstate generators were jurisdictional facilities under § 201(b), the ownership or operation of which made an entity a public utility under § 201(e). FERC therefore concluded that a single-asset company formed to own the Grand Gulf nuclear generating plant was a "public utility" owner of FERC-jurisdictional facilities.[3] The D.C. Circuit parsed the statutory text and

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[2] *See, e.g., South Carolina Electric & Gas Co.*, 29 F.E.R.C. ¶ 61,350 (1984); *United Illuminating Co.*, 29 F.E.R.C. ¶ 61,270 (1984); *Virginia Electric and Power Company*, 25 F.E.R.C. ¶ 61,261 (1983). One case in this line went to the D.C. Circuit, where the appellate litigation addressed other issues, and was affirmed. *Consumers Power Co.*, 53 F.E.R.C. ¶ 61,382, at 62,344 (1990), *aff'd on other grounds,* 963 F.2d 1574, 1583 (D.C. Cir 1992)).

[3] *Middle South Energy*, 32 F.E.R.C. ¶ 61,425, at 61,948 (1985), *aff'd sub nom. Mississippi Industries v. FERC*, 808 F.2d 1525 at 1533, 1540 (D.C.

reviewed *Hartford* and *Connecticut*, and expressly noted the Supreme Court's approval of *Hartford* in affirming FERC's holdings. *Mississippi Industries*, 808 F.2d at 1544-45 ("In this discussion, the Court accepts the proposition that FERC may lawfully assert jurisdiction over matters pertaining to generation where it found that generation facilities are used as facilities for interstate sales."). The D.C. Circuit agreed with FERC's observation that "allocating cost does, to some extent, result in 'regulation of matters relating to generation,'"[4] and noted that "under the clear terms of the statute, the Commission has been awarded jurisdiction over generating facilities 'to the extent provided in other sections,' including jurisdiction necessary to effectuate regulation of interstate wholesale rates."[5]

In a related case, the Supreme Court relied upon that holding in ruling that FERC's statutorily valid action (the allocation of Grand Gulf nuclear plant costs among the joint owners of the single-asset firm that owned the plant) preempted state law. *Mississippi Power & Light Co. v. Mississippi ex. rel. Moore,* 487 U.S. 354, 374 & n.13 (1988). Justice Scalia explained in concurrence that the § 201(b)(1) restriction of FERC's jurisdiction over generation to that "specifically provided" in succeeding sections refers to the regulatory authorities referenced in those sections; that FERC's rate regulatory authority was one example of those authorities; and that when FERC regulates a transaction involving a generating facility, it regulates the transaction,

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Cir.), *vacated in other part*, 822 F.2d 1104 (D.C. Cir.), *cert. denied sub nom. Arkansas Pub. Serv. Comm'n v. FERC*, 484 U.S. 985 (1987).

[4] *Id.* at 1543.

[5] *Id.* at 1545 n.74.

not the facility itself, and thus does not run afoul of any limitations on the exercise of generation-related jurisdiction. *Id.* at 383.

Decisions in the case that came before this Court as *New York v. FERC*, 122 S. Ct. 1012, 535 U.S. 1 (2002) were in accord, and specifically found that FERC's Section 203 disposition review authority extends beyond transmission to facilities for interstate sales at wholesale. In the underlying rulemaking,[6] FERC distinguished between authority over the physical aspects of generation, such as the operation of facilities, and the economic matters over which it possesses regulatory jurisdiction:

> Parts II and III [of the FPA]....provide authority over certain interconnections; the rates, terms and conditions of wholesale sales of electric energy in interstate commerce; *the disposition and merger of facilities used for such sales and transmission*; issuance of securities; accounting matters; and interlocking directories. *Thus, the Commission's jurisdiction over generation extends only to matters directly related to the economic aspects of transactions resulting from such facilities.*

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[6] *Promoting Wholesale Competition through Open Access Non-discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities*, 61 Fed. Reg. 21,540, 21,680 (emphasis added), *modified*, Order No. 888-A, 62 Fed. Reg. 12,274, *order on reh'g*, Order No. 888-B, 62 Fed Reg. 64,688, *aff'd in part and remanded in part sub nom. Transmission Access Policy Study Group v. FERC*, 225 F. 3d 667 (D.C. Cir. 2000), *aff'd on issues reviewed sub nom. New York v. FERC*, 122 S. Ct. 1012, 535 U.S. 1 (2002).

On review, the D.C. Circuit cited *Mississippi Industries* approvingly and held that because § 201(b) is modified by the "except" clause, "FERC may exercise jurisdiction over generation facilities to the extent necessary to regulate interstate transmission."[7]

Similarly, in 1998 FERC acknowledged that "traditionally such facilities [those defined in § 201] have [included]...physical facilities such as generation plants."[8] In affirming, the D.C. Circuit reiterated that "the archetypal 'facilities' under the Act are power generating plants and transmission lines."[9]

Thus, prior to this case, the problem was straightforward. FERC had found, and the courts had affirmed, that interstate generators are jurisdictional facilities under § 201(b) and that entities who own or operate them become public utilities under § 201(e). The Second Circuit had concluded that § 203 is triggered when such generators are transferred. The statutory text directly referenced "the production ... of electric energy by means of facilities under the jurisdiction of the Commission." FERC asserted jurisdiction over interstate generators for certain statutory purposes, such as those of §§ 205-06. But when a disposition of an interstate generator came to its attention, FERC disclaimed § 203 authority over that disposition (absent the

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[7] *Transmission Access Policy Study Group v. FERC*, 225 F.3d 667, 718 D.C. Cir. 2000), *aff'd on issues reviewed sub nom. New York v. FERC*, 122 S. Ct. 1012, 535 U.S. 1 (2002).

[8] *Automated Power Exchange, Inc.*, 82 F.E.R.C. ¶ 61,287, at 62,106 (1998), *reh'g denied*, 84 F.E.R.C. ¶ 61,020, at 61,085-86 (1998), *aff'd*, 204 F.3d 1144 (D.C. Cir. 2000).

[9] 204 F.3d at 1147.

happenstance of a contemporaneous disposition of sufficiently-valued other facilities deemed to be jurisdictional) by asserting that § 201(b) excluded generators from the meaning of jurisdictional facilities.

Alongside these developments of agency practice, interstate generators and their disposition had gained increasing importance to the nation's economic life. Wholesale sales in interstate commerce had gone from the electric industry's fringe to its core. *See New York v. FERC,* 122 S.Ct. 1012, 1016-18, 535 U.S. 1, __ (2002). During August 1997 through December 2000 alone, more than a tenth of the nation's generating capacity had been or was to be disposed of.[10]

It was in that context that Citizen Power, Inc. and the American Public Power Association filed their February 11, 1999 Petition for Declaratory Order, and Citizen Power filed its February 11, 1999 and July 26, 2000 complaints. Petitioners asked FERC to confirm its § 203 authority over dispositions of interstate generators.

Citing the foregoing authorities and others, Petitioners argued that FERC's line of unexplained disclaimers of § 203 jurisdiction over interstate generators was inconsistent with the text and legislative history of the FPA, and contradicted FERC's own prior rulings, affirmed by the courts. Petitioners reasoned that the "except" clause in § 201(b) was clearly intended to give FERC *some* jurisdiction over

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[10] *Regional Transmission Organizations,* Order No. 2000, 65 Fed. Reg. 810, 813 (Jan. 6, 2000), *order on reh'g,* Order No. 2000-A, 65 Fed. Reg 12,088 (March 8, 2000), *appeal dismissed, Pub. Util. Dist. 1 v. FERC* (D.C. Cir. 2001).

generators, and that the preceding "but" clause served to limit that jurisdiction (1) to generators used to produce electricity sold at wholesale in interstate commerce, and (2) to the substantive regulatory powers that FPA Parts II and III define with a scope that encompasses generation. One such power, Petitioners contended, was the Commission's § 203 authority to review disposition of "facilities subject to the jurisdiction of the Commission," *i.e.*, the facilities that are made jurisdictional by § 201(b): facilities for wholesale sales (or transmission) in interstate commerce.

On February 7, 2001, FERC rejected the request for declaratory order and dismissed the complaints. *American Public Power Ass'n, et al.*, Order Disclaiming Jurisdiction Over Certain Dispositions, 94 F.E.R.C. ¶ 61,104 (2001). This order is reprinted in Appendix B.

FERC's order denying the Petition found that "[f]or Section 203 purposes, the term, jurisdictional facilities, has never been read to include generation facilities." 94 F.E.R.C. at 61,423. FERC stated that "there is no precedent, legislative history, or case law which would support [Petitioners'] conclusion," *id.*, without discussing the authorities Petitioners had cited. The FERC order asserted, as FERC's prior disclaiming orders had, that "Section 201(b) expressly exempts from the Commission's jurisdiction 'facilities used for the generation of electric energy,'" calling this the "Generation Exemption." FERC stated that by citing the words that follow and qualify the "Generation Exemption — the "except" clause ("except as provided in this Part and the Part next following") — Petitioners were seeking to "muddy the waters." *Id.* FERC also concluded that interstate generator dispositions were not jurisdictional

under § 203 because there was no "necessary nexus" between such dispositions and interstate transmission or sales of electric energy. *Id.*

Citizen Power and APPA timely sought rehearing, and on April 6, 2001 FERC issued a notice stating that it had "decided to take no action on the request." Notice of Denial of Rehearing, 95 F.E.R.C. ¶ 61,023 (2001). This order is reprinted in Appendix B.

On May 30, 2001, Citizen Power and APPA timely petitioned the D.C. Circuit for review. The D.C. Circuit thus had jurisdiction pursuant to 16 U.S.C. § 825*l*(b). On brief, FERC conceded that it has jurisdiction over generating facilities for purposes of FPA § 207, without articulating a basis in the statutory text for finding that generating facilities are jurisdictional as to § 207 but not jurisdictional as to § 203. This and other cited excerpts from FERC's brief are reprinted in Appendix G.

On April 25, 2002, the D.C. Circuit denied that appeal, by *per curiam* Judgment. It reasoned that the under the "plain text" of § 201(b), a specific extension of jurisdiction to generators must appear in each subsection that follows § 201 before the regulatory powers of that subsection can reach generators. The court found that § 203 contains no such specific provision. The court affirmed FERC's finding that generators are not facilities under § 203 because there is no "necessary nexus" between a facility disposition and the transmission or sale of electric energy. Finally, the court found that, even if there was merit to Petitioner's claims, FERC's interpretation was entitled to deference under *Chevron, U.S.A., Inc. v. NRDC*, 467 U.S. 837, 843 (1984). This Judgment is reprinted in Appendix A.

On June 10, 2002, Citizen Power and APPA timely sought rehearing, either by the panel or *en banc*. Both forms of rehearing were denied on June 21, 2002, in orders reprinted in Appendix C. On July 18, 2002, Citizen Power filed a Motion to Publish the D.C. Circuit's Judgment; that motion was denied by memorandum order dated August 8, 2002.

This petition for writ of certiorari followed.

REASONS FOR GRANTING THE WRIT

1. The DC Circuit's Judgment conflicts with prior Supreme Court, Second Circuit, and D.C. Circuit rulings that interstate wholesale generators are facilities "subject to the jurisdiction of the Commission" under FPA § 201(b) — which, as the Second Circuit found and the statutory text demands, makes their disposition subject to FPA § 203.

The conflict is clear. The early Commission and the Second Circuit in *Hartford*, and a later Commission and the D.C. Circuit in *Mississippi Industries*, all found that generators, when used to produce electricity sold at wholesale in interstate commerce, are jurisdictional facilities under § 201(b), and an entity that owns or operates them is a jurisdictional public utility under § 201(e). The Supreme Court commended the *Hartford* finding that interstate generators are jurisdictional under § 201(b) (in *Connecticut*), and relied upon the *Mississippi Industries* jurisdictional holding in the related case of *Mississippi Power & Light*, when it found that the FERC order based on that holding was indeed within FERC's jurisdiction and therefore did preempt Mississippi law.

The Second Circuit in *Hartford* found that because interstate generators are jurisdictional facilities under § 201(b), their disposition triggers FERC's review authority under § 203. In stating that no public utility shall dispose of its "facilities subject to the jurisdiction of the Commission," § 203 refers back to § 201(b) for the definition of facilities. Section 203 offers no separate definition limiting its applicability to some subset of jurisdictional facilities. The Second Circuit thus reached the inescapable conclusion that facilities found to be jurisdictional under § 201(b) must trigger § 203 review when they are disposed of.

Without even acknowledging *Hartford*, the other findings, or the legislative history on the important terms at issue, much less attempting the impossible task of reconciling them with its holding, the D.C. Circuit found in this case that while interstate generators are indeed jurisdictional facilities for purposes of §§ 205-206, they are not jurisdictional for purposes of § 203, and FERC therefore lacks direct authority to review their dispositions. The D.C. Circuit's refusal to acknowledge the conflict cannot make it disappear.[11]

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[11] FERC's orders below did not address *Hartford*, and went so far as to deny that § 203 had ever been read to apply to generation. 94 F.E.R.C. at 61,423. In addressing *Hartford* on brief, FERC recognized its holding that generators are jurisdictional, but made two dismissive claims. First, FERC asserted (at 27, 28) that this *Hartford* holding "was rejected by the Supreme Court in *Connecticut*." Second, FERC asserted (at 28) that "*Hartford* ... clearly cannot be sustained under the statute [because]. ...§ 201(b) gave the Commission jurisdiction over facilities for interstate transmission and wholesale sales of electric energy, but then specifically *excepted* generation facilities from that grant of jurisdiction."

2. Resolving this conflict matters greatly to the nation's electric industry and its customers.

The Supreme Court has repeatedly interceded to clarify the jurisdictional reach of FPA Parts II–III, with a frequency reflecting the importance of that delineation to the nation's economic life.[12] The Supreme Court's clarification earlier this year that FPA § 201(b) gives FERC statutory jurisdiction over interstate transmission for bundled retail sales[13] was only the most recent instance. It is now imperative that the Supreme Court resolve the conflict between the Second and D.C. Circuits over the extent of FERC's jurisdiction over generating facilities under § 201(b), and whether FERC has jurisdiction over the transfer of those facilities by a public utility under § 203. Recent fundamental changes in the electric utility industry make that resolution urgent.

Electricity is a vital, in some cases essential, product, both as an input to the nation's industry and for personal end-

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Both claims are manifestly erroneous. The D.C. Circuit's Judgment did not adopt FERC's claims about *Hartford;* it simply ignored the case, and implicitly denied the existence of a conflict by declining to publish its opinion. D.C. Circuit Rule 36(a) calls for publishing judgments that create a conflict among Circuit and other precedents. Although D.C. Circuit Rule 36(b) allows for non-publication "where the issues occasion no need therefore," in this case both the industry restructuring context and the conflicts with *Hartford* and other precedent are clearly issues that do occasion a need for publication under Rule 36(b).

[12] A non-exhaustive survey of Supreme Court decisions (those annotated under 16 U.S.C.S. § 824 as relating to "Jurisdiction of the Commission, generally" or to the definition of "Public utility") shows Supreme Court decisions in 1943, 1945, 1952, 1964, 1972, and 1976. Additional more recent instances are discussed in the text.

[13] *New York v. FERC*, 122 S. Ct. 1012, 535 U.S. 1 (2002).

use consumption.[14] Indeed, Congress has declared that "the business of transmitting and selling electric energy for ultimate distribution to the public is affected with the public interest, and that Federal regulation of matters relating to generation to the extent provided ... is necessary in the public interest."[15] That is why it charged the agency with protecting consumers from public utilities' market power. To that end, the 74th Congress gave the agency two main tools: (1) facility disposition review under § 203 to prevent market power formation through uneconomic consolidations and (2) rate review under §§ 205-06 to prevent market power's exercise. Both are essential; neither suffices in isolation to protect the national public interest.

The industry is now undergoing a fundamental restructuring that makes generator disposition review essential. Vertically-integrated utilities, legacies of the break-up that followed the Public Utility Holding Company Act of 1935, are in turn being dismantled. FERC has urged with considerable success that all transmission facilities be transferred to the control of non-generating entities, separate from the control of generation facilities.[16] It plans to mandate entry before August 2003 into an arrangement for transfer and completion of the transfer before November

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[14] Anyone with a friend or relative who requires outpatient oxygen understands that generated electricity can be an essential good.

[15] FPA § 201(a).

[16] *Notice of Proposed Rulemaking, Remedying Undue Discrimination through Open Access Transmission Service and Standard Electricity Market Design*, 67 Fed. Reg. 55,452, at 55,454, 55,458 (Aug. 29, 2002) ("*SMD NOPR*") (summarizing recent progress towards separation of generation and transmission).

2004.[17] While operational control is what matters most for market power, ownership is likewise being separated; *e.g.*, generation is being built by and transferred to generation-only companies.[18]

Simultaneously, regulatory price control is being loosened; federal and state regulators are increasingly substituting a reliance on generation market competition. FERC now allows most utilities to charge "market prices" at wholesale, and its regulations (18 C.F.R. § 35.27(a)) generically presume that generators constructed after 1996 lack generation market power. Almost half of the states have deregulated electricity rates to ultimate customers.[19] One result has been predictable: Generators are being transferred at a record pace, potentially consolidating control in fewer hands as utilities seek to shield themselves from competition. *See, e.g.* Order No. 2000, 65 Fed. Reg. 810 at 813. FERC itself has expressed concern about possible effects of consolidation of generators on market performance. *Enova Corp.*, 79 F.E.R.C. ¶ 61,107 at 61,496 (1997) (FERC's concern with merging power marketers is

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[17] *Id.* at 55,469-70.

[18] *See* ENERGY INFORMATION ADMINISTRATION, THE CHANGING STRUCTURE OF THE ELECTRIC POWER INDUSTRY 2000: AN UPDATE 23-25, 91-97 (2000) (available at http://www.eia.doe.gov/cneaf/electricity chg_stru_update/update2000.html (last visited Sept. 12, 2002)).

[19] *See* ENERGY INFORMATION ADMINISTRATION, STATUS OF STATE ELECTRIC INDUSTRY RESTRUCTURING ACTIVITY—AS OF SEPTEMBER, 2002 (available at http://www.eia.doe.gov/cneaf/electricity/chg_str/ regmap.html (last visited Sept. 14, 2002) ("Twenty-four states and the District of Columbia have either enacted enabling legislation or issued a regulatory order to implement retail access [allowing customers to choose a supplier].").

heightened where they own geographically concentrated generators).

When generation and transmission were held by vertically integrated entities, § 203 facility dispositions typically involved both, and FERC used its transmission jurisdiction to review the market impacts of generator transfers. Indeed, in those cases the market power effect of generator consolidations has been FERC's central regulatory concern. *See, e.g.*, 18 C.F.R. Part 33. But when transmission and generation are separated into the hands of distinct legal entities, that "hook" will be gone.

Denial of market entry through transmission control used to be the main source of vertically integrated utilities' market power — their ability to influence price and affect market performance. With transmission control being passed to generation-independent entities and the loosening of rate regulation, the main market power problem becomes the consolidation of generation control. FERC is currently engaged in a rulemaking that attempts to structure effective markets, in order to prevent a recurrence of the rolling blackouts, price hikes, and record bankruptcy (of Pacific Gas & Electric Company) that recently plagued California.[20] But the fundamental requirement of an effectively competitive market is vigorous competitors. Without the authority to review generation consolidation, FERC cannot assure that that requirement is met.

If the D.C. Circuit's erroneous finding that FERC has no jurisdiction over generator dispositions is allowed to stand,

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[20] *See, e.g., SMD NOPR*, 67 Fed. Reg. at 55465, 55572-76, 55581-85.

generators will be consolidated and multi-state markets[21] imperiled without FERC review. State regulatory commissions and other federal agencies are no substitute for FERC's national public interest mandate, energy expertise, and Congressionally-intended ability to integrate disposition review with other forms of ongoing regulatory supervision.

3. The D.C. Circuit's statutory construction cannot withstand scrutiny.

Instead of confronting established case law and analyzing the legislative history, the D.C. Circuit offered only unsupported assertions for its finding that interstate generators are not jurisdictional facilities under § 203. None of its assertions can withstand scrutiny.

First, the court found that "under the plain text of the Act" FERC properly disclaimed jurisdiction because "Section 203 itself does not 'specifically provide' for Commission jurisdiction over generation facilities within the meaning of § 201(b)(1)." Given that the FPA's plain text calls generation ("production") facilities jurisdictional[22] and states that all dispositions of jurisdictional facilities valued above $50,000 require review,[23] this reading plainly departs from the statutory text.

In its D.C. Circuit brief (at 29), FERC stated the rationale that the court apparently relied on to justify the

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[21] FERC recently required formation of a functional common market "spanning a geographical area from New Jersey in the East to the Rocky Mountains in the West." *Alliance Cos.*, 100 F.E.R.C. ¶ 61,137, at 61,527 (July 31, 2002).

[22] § 206(d).

[23] § 203.

departure: "under § 201(b), the Commission has no jurisdiction over generation facilities, whether or not used as 'aids' to wholesale sales, unless *another provision* of the FPA 'specifically provides'" (emphasis added). But this construction misreads the FPA. Section 201(b) begins by conferring jurisdiction over all facilities used for wholesale sales. That category plainly includes the generators that create the product being sold, which FERC concedes (as quoted above).

The back-and-forth of the but-and-except clauses that follow cannot be read to require that each succeeding subsection contain a further, express provision of jurisdiction over generation before generators become jurisdictional for purposes of that subsection. As the FPA's 1935 Conference Report explained, the "except" clause in § 201(b) was added to clarify that the Commission *does* have jurisdiction over generation "to the extent *regulation thereof* is provided for" in those other subsections.[24] Thus, Congress preserved generator jurisdiction to the full extent those other subsections confer *regulatory authority*, not just to the narrower extent that what they contain speaks in terms of a specific further grant of *jurisdiction*. *See Mississippi Power & Light Co. v. Mississippi ex rel. Moore,* 487 U.S. 354, 383 (1988) (Scalia, J., concurring) ("[I]t is reasonable to regard FERC's § 824e(a) authority to set wholesale rates as precisely an example of jurisdiction 'specifically provided'").

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[24] Conference Report to Accompany S. 2796, H. Rep. No. 1903, 74th Cong., 1st Sess., 74 (Aug. 23, 1935) (emphasis added), *reprinted at* 79 Cong. Rec. H14621 (Aug. 24, 1935). *See also Mississippi Industries*, 808 F.2d at 1543 (explaining legislative history of the except clause).

The Commission's authority for prior review of generator dispositions under § 203 is another example of regulation specifically provided. Conversely, to the extent regulation is not provided — *e.g.*, as to generating units *not* used for interstate wholesales (the majority in 1935, and still extant in some locations today), or as to generator siting, FERC does not have jurisdiction. The court cited no basis for its premise that a further jurisdictional provision is required (other than the unexplained and erroneous assertion that the "plain text" requires such a reading), and none exists.

Moreover, having adopted the view that jurisdiction over generation requires a specific grant in each succeeding subsection, the court, in the very next paragraph, quickly abandoned it. Instead, it turned to an assertion that "the Congress granted the Commission limited authority to regulate generation facilities under certain circumstances enumerated in sections 205 and 206 of the Act." The court did not identify what language in these sections provides this grant and constitutes the "specific provision" parallel to what it demanded from § 203.

Section 205 contains no such "specific provision" of jurisdiction over generators.[25] It simply requires the Commission to review wholesale rates of public utilities to ensure they are "just and reasonable" and in the public interest. This grant of authority over wholesale rates is no different than the § 203 authority over facility dispositions.

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[25] Section 206(d) does contain such a reference, and its language shows that generation is a jurisdictional facility for all FPA purposes. Of course, a reference in § 206(d) does nothing to create a generation-specific provision within § 205.

Whatever "specific provision" of jurisdiction the court may have been looking for, it is safe to conclude that § 205 contains no such provision.[26] There is no basis for a finding that the Commission's regulatory authority under § 205 includes jurisdiction over generators, but § 203 does not because it lacks a "specific provision" of such jurisdiction.

Nor did the D.C. Circuit explain how, if interstate generators are jurisdictional facilities under § 201(b) — as the Second Circuit found in *Hartford* and the D.C. Circuit itself found in *Mississippi Industries* — they are *not* jurisdictional facilities under § 203. Congress did not limit § 203's application to any subset of jurisdictional facilities — not to transmission, not to facilities over which FERC has "plenary" or unlimited jurisdiction, and not to facilities made jurisdictional by § 203 itself. Section 203 simply repeats the phrase "facilities subject to the jurisdiction of the Commission" contained in § 201(e), thereby referring back to 201(b) for the definition of jurisdictional facilities established there. *Hartford* found, and the plain text of § 203

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[26] If it were necessary to find a reference to generation in § 203, however, it exists, unlike § 205. Section 203(b) allows FERC to condition an approval of a disposition to secure "the coordination in the public interest of facilities subject to the jurisdiction of the Commission." In FPA parlance, "coordination" typically refers to coordinated dispatch of generation. *See Federal Water Power Act, 1935*: Hearings on H. R. 5423 Before the House Interstate & Foreign Commerce Comm., 74th Cong. 549-550, 560 (statement of FPC Solicitor DeVane that disposition review was included as part of the Commission's "jurisdiction over production facilities connected with the interstate transmission facilities," principally in order "to carry out the regional coordination plan that is provided in section 202 … .").

demands, that § 203 reaches every kind of facility made "subject to the jurisdiction of the Commission" by § 201(b).

The leading D.C. Circuit case on § 203 reached the same conclusion. *Duke Power Company v. FPC,* 401 F.2d 930 (D.C. Cir. 1968) concerned whether § 203 reaches local distribution facilities. The court concluded that it does not, because local distribution is a facility neither for interstate transmission nor for interstate wholesale sales, and therefore is not a jurisdictional facility within § 201. *Id.* at 949-950. But the court made clear that § 203 does reach all facilities specifically made jurisdictional "in Section 203(a) *or elsewhere in the Act.*" *Id.* at 940.

It is undisputed and indisputable that interstate generating facilities are subject to FERC's authority. Again, § 206(d) directly references "production [*i.e.,* generation] ... facilities under the jurisdiction of the Commission." FERC itself conceded below that § 207 "authorizes [FERC] in certain circumstances to compel the operation of generating facilities." FERC Br. at 18. That concession should have been dispositive, when read together with *Duke Power Company v. FPC,* 401 F.2d at 942-43 (D.C. Cir. 1968) (applicability of § 207 is "restricted to jurisdictional facilities"). Another example of how FERC's jurisdiction extends to generation is § 202, which authorizes FERC to "divide the country into regional districts for the voluntary interconnection and coordination of facilities for the generation, transmission, and sale of electric energy."

In this context, it was incumbent on both the agency and the court to explain how interstate generation could be subject to numerous FPA authorities without being a jurisdictional facility subject to § 203. FERC was silent on

that point. The court's only explanation was the conclusory statement that § 201 contains a "clear bifurcation." Between what? That went unspecified. Between facilities for wholesale sales and generation facilities? Logic and *Mississippi Industries* say no. Between facilities made jurisdictional by § 201(b) and facilities subject to § 203? Logic and *Duke* say no. Moreover, the Court also failed to address the agency's §§ 202 and 207 authorities and explain on which side of the supposed § 201(b) bifurcation they lie. The textually clear fact is that § 201(b) has a complex structure in which those generators used for sales at wholesale in interstate commerce are jurisdictional, not a simple two-part "bifurcation" with generators on one side and jurisdiction on the other.

Sweeping aside these fundamental questions, the court adopted FERC's claim that the disposition of an interstate generator is jurisdictional under § 203 only if a "necessary nexus" can be found between that disposition and the interstate transmission or sale of electric energy. Thus, the court concluded, that generators are jurisdictional facilities for some FPA purposes does not make them jurisdictional under § 203. In its brief below (at 24), FERC explained the premise underlying this claim: "The real question is whether the Commission must assert jurisdiction over dispositions of generation facilities under § 203 to regulate wholesale sales made from such facilities."

The court cited nothing in the FPA's text, legislative history, or case law exegeses to support the novel interpretation that § 203 disposition review is somehow subordinate to, or contingent on, FERC's §§ 205-06 authority over wholesale rates. Disposition and rate review are

separate but mutually reinforcing powers. Each is necessary but insufficient to enable FERC to regulate wholesale markets so as to protect against the exercise of market power by utilities and ensure "just and reasonable" rates. Congress understood that to fully protect the public interest FERC must have both § 203 authority over facility sales and § 205 authority over sales of electricity from those facilities. Nothing in the legislative history or appellate case law supports the court's claim that a § 203 review is triggered only if it is necessary to FERC's exercise of its authority over wholesale rates.

The court's idea of looking for a nexus between the act of transferring an asset and a selling the electricity produced by the asset does not even make sense. Like any producing firm, a utility has the option of either selling its output (the electric energy produced by its generating plant) in exchange for a stream of earnings, or selling the plant itself to retrieve its invested capital. These are distinct, and alternative, economic acts. If you dispose of the plant, you can't sell its power output; if you contract to sell the output, you can't dispose of the plant. The court looked for something that can't exist, and, having not found it, concluded that § 203 jurisdiction must exclude interstate generators.

There *is* a nexus, but it is not the one the court seemed to demand. Public utilities that dispose of their interstate generators have, by definition, been engaged in interstate wholesale sales using those facilities. The fact that a particular generator is used for interstate sales at wholesale is what makes it a jurisdictional facility, as *Hartford* found six decades ago. That is the "nexus" that makes its disposition subject to § 203.

Finally, the court claimed that even if Petitioner's claims had merit, the Commission's "longstanding, reasonable interpretation would be entitled to deference under *Chevron, U.S.A., Inc. v. NRDC*, 467 U.S. 837, 843 (1984)." No such deference is warranted. Notwithstanding the agency's characterization of its interpretation as one held "for decades" and the court's uncritical acceptance of that characterization, it is not true that the agency has consistently disclaimed jurisdiction over generating facilities even during the most recent decades.

On the few occasions when the agency has carefully parsed the pivotal § 201(b) statutory text, it has consistently found that interstate generators are jurisdictional — *e.g.*, both in *Hartford* when the agency was new and more recently in *Mississippi Industries*. To return to the touchstone of our case, the Second Circuit in *Hartford* specifically found both that interstate generators *are* jurisdictional, and that this status implicates § 203. FERC has never acknowledged, much less explained, the inconsistency between its recent § 203 practice and those decisions.

Chevron gives agencies leeway in statutory interpretation matters of first impression. But it neither allows agencies to depart from prior interpretations without explanation, *INS v. Cardoza-Fonseca*, 480 U.S. 421, 446 n.30 (1987) ("An agency interpretation … which conflicts with the agency's earlier interpretation is 'entitled to considerably less deference' than a consistently held agency view."); *Motor Vehicles Manufacturers Ass'n v. State Farm*

Mutual Automobile Insurance Co., 463 U.S. 29, 57 (1983),[27] nor allows agencies to depart from their prior interpretations after they have been adopted by the courts, *compare Maislin Indus. v. Primary Steel, Inc.*, 497 U.S. 116, 131 (1990) ("Once we have determined a statute's clear meaning, we adhere to that determination under the doctrine of *stare decisis*, and we judge an agency's later interpretation of the statute against our prior determination of the statute's meaning.") *with Conoco Inc. v. FERC,* 90 F.3d 536, 547 (D.C. Cir. 1996) ("the Commission had some leeway in construing the NGA's jurisdictional provisions in the first instance, as there was no controlling judicial precedent").

Here, FERC both departed from its prior interpretation without explanation, and did so after that interpretation had been adopted by the Courts.

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[27] *See also Automated Power Exchange,* 204 F.3d at 1151 ("Even if FERC's statutory interpretation might otherwise be reasonable..., FERC must also interpret the Act consistently with its own precedent or explain its reasons for departure therefrom.").

CONCLUSION

The rulings below err. They starkly conflict with the statutory construction adopted by the Supreme Court, the Second Circuit, and prior panels of the D.C. Circuit. And they undermine a statutorily intended and increasingly important federal regulatory power that goes to the heart of the nation's industrial economy. This petition for certiorari should be granted.

Respectfully submitted,

CYNTHIA S. BOGORAD
Counsel of Record
AND OTHERS AS LISTED
ON THE COVER

APPENDICES

APPENDIX A

JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE D.C. CIRCUIT

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 01-1240 **September Term, 2001**

Filed On: April 25, 2002

Citizen Power, Inc., et al.,
Petitioners
v.
Federal Energy Regulatory Commission,
Respondents

Duquesne Light Company, et al.,
Intervenors

PETITION FOR REVIEW OF ORDERS OF THE FEDERAL ENERGY REGULATORY COMMISSION

Before: EDWARDS, HENDERSON AND GARLAND,
Circuit Judges.

JUDGMENT

This case was considered on the record from the Federal Energy Regulatory Commission (Commission) and on the briefs filed by counsel. Citizen Power, Incorporated and the American Public Power Association (collectively, Citizen Power) petition for review of (1) a February 7, 2001 Commission order disclaiming jurisdiction over the potential disposition of power generation facilities by FirstEnergy Corporation and Duquesne Light Company (collectively, Intervenors), *see Am. Pub. Power Ass'n, et al.*, 94 FERC ¶ 61,104 (2001); and (2) an April 6, 2001 notice of the Commission's denial of Citizen Power's request for a

rehearing, *see Am. Pub. Power Ass'n, et al.*, 95 FERC ¶ 61,023 (2001).

Section 203 of the Federal Power Act (Act) prohibits a public utility from "dispos[ing] of ... its facilities subject to the jurisdiction of the Commission ... without first having secured an order of the Commission authorizing it to do so." 16 U.S.C. § 824b(a). Citizen Power filed with the Commission a complaint against each of the Intervenors and a request for a declaratory order, alleging that the Intervenors had failed to seek Commission approval to transfer (i.e., dispose of) generation-only facilities. Under the plain text of the Act, the Commission properly disclaimed jurisdiction. Section 201 of the Act states that the Commission "shall have jurisdiction over all facilities for... transmission or sale of electric energy, but shall *not* have jurisdiction, except as specifically provided in this subchapter and [the next subchapter], over facilities used for the *generation* of electric energy." 16 U.S.C. § 824(b)(1) (emphasis added). As the Commission points out, "Section 203 itself does not 'specifically provide' for Commission jurisdiction over generation facilities within the meaning of § 201(b)(1) ... [and so] the Commission has for decades consistently disclaimed jurisdiction over dispositions of generating facilities under § 203." Br. of Resp't at 8, 10 (citing, *inter alia, Consumers Power Co.*, 52 FERC ¶ 61,023 (1990), *aff'd, Mich. Pub. Power Agency v. FERC*, 963 F.2d 1574 (D.C. Cir. 1992)).

Citizen Power resists this conclusion, arguing that the Commission has section 203 jurisdiction over the disposition of generation facilities because they are in fact facilities "for [the] *transmission* or *sale* of electric energy" under section 201. *See* Br. of Pet'r at 7. In doing so, it ignores the clear

bifurcation of that section. As the Commission properly found, "[t]here is no necessary nexus between the interstate transmission or sale of electric energy, on the one hand, (the triggering events giving rise to our jurisdiction) and the disposition of a generation facility by itself" on the other. Deferred Appendix at 3. Moreover, that the Congress granted the Commission limited authority to regulate generation facilities under certain circumstances enumerated in sections 205 and 206 of the Act, see Br. of Pet'r at 8, does not mean that those facilities are "subject to the jurisdiction of the Commission" within the meaning of section 203. Finally, even if the text of the Act could bear the strained meaning Citizen Power advocates, the Commission's longstanding, reasonable interpretation would be entitled to deference under *Chevron, U.S.A., Inc. v. NRDC*, 467 U.S. 837, 843 (1984).

Therefore, it is ORDERED that the petition for review is denied.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or rehearing en banc. See Fed. R. App. P. 41(b); D.C. Cir. Rule 41(a)(1).

Per Curiam

FOR THE COURT:

s/Mark J. Langer

Mark J. Langer,
Clerk

APPENDIX B

AGENCY ORDERS BELOW

UNITED STATES OF AMERICA 94 FERC ¶ 61,104
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Curt Hébert, Jr., Chairman;
William L. Massey, and Linda Breathitt.

American Public Power Association and Citizen Power, Inc.	Docket No. EL99-40-000
Citizen Power Inc. v. Duquesne Light Company	Docket No. EL99-39-000
Citizen Power Inc. v. FirstEnergy Corporation and the FirstEnergy Operating Companies	Docket No. EL00-94-000

ORDER DISCLAIMING JURISDICTION OVER CERTAIN DISPOSITIONS

(Issued February 7, 2001)

In this order, Petitioners ask us to revisit an issue previously addressed by the Commission in numerous cases: whether under section 203(a) of the Federal Power Act (FPA),[1] the Commission has jurisdiction when a public utility disposes of only generation facilities. Consistent with our prior holdings, we answer the question here in the negative.

[1] 16 U.S.C. § 824b(a) (1994).

Background

On February 11, 1999, the American Public Power Association (APPA) and Citizen Power, Inc. (Citizen Power) (collectively, Petitioners) filed a request for a declaratory order, in Docket No. EL99-40-000, regarding our jurisdiction under section 203(a) of the FPA to review the disposition of generation facilities by a public utility. On that same date, Citizen Power filed a complaint against the Duquesne Light Company (Duquesne), in Docket No. EL99-39-000, raising substantially the same issue.[2] On July 26, 2000, the same jurisdictional issue was again raised by Citizen Power in a complaint filed against FirstEnergy Corp. (First Energy) and the First Energy Operating Companies (Operating Companies), in Docket No. EL00-94-000.[3]

In support of their filings, Petitioners assert that federal review of generation-only dispositions is necessary, under

[2] In a submittal dated May 9, 2000, in Docket No. EC00-54-000, Duquesne notified the Commission that the transfer of assets at issue had been consummated, as of April 28, 2000. The underlying approvals were addressed by the Commission in *Duquesne Light Company, et al.*, 91 FERC ¶ 62,016 (2000).

[3] On December 22, 1999, FirstEnergy, on behalf of three of its operating companies (Ohio Edison Company, Cleveland Electric Illuminating Company, and The Toledo Edison Company), filed a restructuring plan with the Public Utilities Commission of Ohio (Ohio Commission), in compliance with Ohio's retail open access law. *See* Ohio Rev. Code Ann. § 4928.31. The plan was approved by the Ohio Commission in an order issued July 19, 2000. *See* In the Matter of the Application of First-Energy Corp. on Behalf of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company for Approval of Their Transition Plans and for Authorization to Collect Transition Revenues, Case No. 99-1212-EL-ETP, *et al. (Ohio Order)*. Among other things, the *Ohio Order* requires the operating and functional control of FirstEnergy's generation facilities to be transferred to the competitive services unit within FirstEnergy, as of January 1, 2001.

section 203 of the FPA, given the failure of state regulation to adequately protect the public interest and promote competition in the restructured electric utility industry. Petitioners further assert that while they are aware of the Commission's precedents disclaiming jurisdiction in this area, these cases were wrongly decided.[4]

Notice of Filing, Interventions, Comments and Answers

Notices of Petitioners' filings were published in the *Federal Register*,[5] with answers, interventions, comments or protests due on or before March 15, 1999, in Docket Nos. EL99-39-000 and EL99-40-000, and on or before July 26, 2000, in Docket No. EL00-94-000. In the two complaint proceedings, answers were timely filed by the respondents. In the declaratory request proceeding, motions to intervene and protest were timely filed by Arizona Public Service Company (APS), Southern Company Services, Inc. (Southern Company), Edison Electric Institute (EEI), the Electric Power Supply Association (EPSA), and Southern California Edison Company (SoCal Edison). Motions to intervene raising no substantive issues were timely filed by Enron Power Marketing, Inc., (Enron), National Rural Electric Cooperative Association (NRECA), Tucson Electric Power Company (Tucson Electric), and Electric Clearinghouse, Inc. (Clearinghouse). In Docket No. EL99-39-000, a notice of intervention was filed by the Pennsylvania Public Utility Commission (Pennsylvania Commission). On March 30, 1999 and April 16, 1999, respectively, answers were filed, in Docket No. EL99-40-000, by Petitioners and EEI; answers were also filed by

[4] Petitioners cite, among other cases, *Nordic Electric, L.L.C. v. The Detroit Edison Co., et al.*, 91 FERC ¶ 61,139 (2000) and *Duquesne Light Company*, 84 FERC ¶ 61,309 (1998).

[5] 64 *Fed. Reg.* 9495 (1999) and 65 *Fed. Reg.* 47,719 (2000).

Citizen Power on March 30, 1999, in Docket No. EL99-39-000, and on August 30, 2000, in Docket No. EL00-94-000.

In its answer, FirstEnergy asserts that Citizen Power's reading of Section 203 is unsupported by the language of Section 203 and the Commission's precedents, and unjustified as a matter of policy. Duquesne, in its answer, makes similar arguments, as do EEI, APS, SoCal Edison, EPSA, and the Southern Company.

Discussion

Procedural Issues

As the respondents to Petitioners' complaints, FirstEnergy, Operating Companies, and Duquesne are parties to the proceedings in which their answers were filed under Rule 102(c)(2) of the Commission's Rules of Practice and Procedure.[6] Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, the notice of intervention filed by the Pennsylvania Commission, in Docket No. EL99-39-000, and the timely-filed, unopposed motions to intervene filed in Docket No. EL99-40-000 by APS, Duquesne, Southern Company, EEI, EPSA, SoCal Edison, Enron, NRECA, Tucson Electric, and Clearinghouse, serve to make these entities parties to the proceedings in which these motions were filed.[7]

Rule 213(a) of the Commission's Rules of Practice and Procedure[8] prohibits an answer to a protest and an answer to an answer, unless otherwise permitted by the decisional authority. We are not persuaded to allow Petitioners' or EEI's answers in Docket No. EL99-40-000; or Citizen Power's answers in Docket Nos. EL99-39-000 and EL00-94-000.

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[6] 18 C.F.R. § 385.102(c)(2) (2000).

[7] *Id.* at § 385.214.

[8] *Id.* at § 385.213(a)(2).

Analysis

Petitioners argue that the Commission's precedents disclaiming jurisdiction over the disposition of generation facilities were wrongly decided and should be reversed. We disagree. Section 203(a) of the FPA states, in relevant part, that "[n]o public utility shall ... dispose of ... its *facilities subject to the jurisdiction of the Commission* ... without first having secured an order from the Commission authorizing it to do so."[9] Thus, Section 203 applies only to jurisdictional facilities. For Section 203 purposes, the term, jurisdictional facilities, has never been read to include generation facilities.

This interpretation of Section 203 is based on the jurisdictional grant of authority set forth in Sections 201(a) and 201(b)(1) of the FPA. Section 201(a), among other things, limits federal regulation, under the FPA, to those matters "which are not subject to regulation by the States." Section 201(b)(1) expressly exempts from the Commission's jurisdiction "facilities used for the generation of electric energy" (Generation Exemption). Consistent with this explicit statutory language, the Commission has held repeatedly that Section 203 does not apply to dispositions of only generation facilities.[10]

Petitioners seek to muddy the waters by citing the language in Section 201(b)(1), which qualifies the Generation Exemption; it provides that the Commission shall not have jurisdiction over facilities used for the generation of

[9] 16 U.S.C. § 824b(a) (emphasis added).

[10] *See, e.g., Duquesne Light Company*, 84 FERC ¶ 61,309, at p. 62,406 (1998); *Entergy Services, Inc.*, 51 FERC ¶ 61,376, at pp. 62,285-86 at n.27, *reh'g denied*, 52 FERC ¶ 61,317 (1990); *United Illuminating Company*, 29 FERC ¶ 61,270, at p. 61,558 (1984).

electric energy "except as specifically provided in this Part and the Part next following ... ."[11] Relying on this qualification, Petitioners seize on the language in section 201(b)(1), which gives the Commission "jurisdiction over all facilities for such transmission or sale of electric energy." Petitioners argue that this language, in particular the term "all facilities," necessarily includes generation facilities, and that the term "jurisdiction," in this context, necessarily encompasses the duties conferred on the Commission under Section 203. Again, we disagree. There is no necessary nexus between the interstate transmission or sale of electric energy, on the one hand, (the triggering events giving rise to our jurisdiction)

[11] Section 201(b)(1) provides in its entirety as follows:

> The provisions of this Part shall apply to the transmission of electric energy in interstate commerce and to the sale of electric energy at wholesale in interstate commerce, but except as provided in Paragraph (2) [addressing Sections 210, 211, and 212 of the FPA] shall not apply to any other sale of electric energy or deprive a State or State commission of its lawful authority now exercised over the exportation of hydroelectric energy which is transmitted across a State line. The Commission shall have jurisdiction over all facilities for such transmission or sale of electric energy, but shall not have jurisdiction, except as specifically provided in this Part and the Part next following, over facilities used for generation of electric energy or over facilities used in local distribution or only for the transmission of electric energy in intrastate commerce, or over facilities for the transmission of electric energy consumed wholly by the transmitter.

and the disposition of a generation facility by itself.[12] Not only does the statutory text support our interpretation, but there is no precedent, legislative history, or case law which would support a contrary conclusion. For all these reasons, we will deny Petitioners' request for a declaratory order and will deny Citizen Power's complaints.

The Commission orders:

Petitioners' request for a declaratory order and Citizen Power's complaints are hereby denied, as discussed in the body of this order.

By the Commission.

(S E A L)

David P. Boergers,
Secretary.

[12] Cf. *Mississippi Industries v. FERC*, 808 F.2d 1525 (D.C. Cir. 1987), *aff'd Mississippi Power & Light*, 108 S.Ct. 2428 (1988) (upholding the Commission's jurisdiction over generation facilities for ratemaking purposes, where the allocation of power from, or costs relating to, generating facilities affect or are the subject of interstate wholesale rates).

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

American Public Power Association and Citizen Power, Inc.	Docket No. EL99-40-001
Citizen Power Inc. v. Duquesne Light Company	Docket No. EL99-39-001
Citizen Power Inc. v. FirstEnergy Corporation and the FirstEnergy Operating Companies	Docket No. EL00-94-001

NOTICE OF DENIAL OF REHEARING
(April 6, 2001)

On March 9, 2001, the American Public Power Association and Citizen Power, Inc. filed a request for rehearing of the Commission's February 7, 2001 order in this proceeding.[1] Take notice that the Commission has decided to take no action on the request. Accordingly, notice is hereby given that the request for rehearing is denied by operation of law pursuant to Rule 713(f) of the Commission's Rules of Practice and Procedure.[2]

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[1] *American Public Power Association and Citizen Power, Inc.*, 94 FERC ¶ 61,104 (2001).

[2] 18 C.F.R. § 385.713(f) (2000).

By direction of the Commission.

(S E A L)

Linwood A. Watson, Jr.,
Acting Secretary.

APPENDIX C

ORDERS ON REHEARING BEFORE THE UNITED STATES COURT OF APPEALS FOR THE D.C. CIRCUIT

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 01-1240 **September Term, 2001**

Filed On: June 21, 2002 [685103]

Citizen Power, Inc. and American Public Power Association,
Petitioners
v.
Federal Energy Regulatory Commission,
Respondent

Duquesne Light Company and FirstEnergy Corp.,
Intervenors

BEFORE: Ginsburg, Chief Judge, and Edwards, Sentelle, Henderson, Randolph, Rogers, Tatel, and Garland, Circuit Judges

O R D E R

Upon consideration of petitioner's petition for rehearing en banc, and the absence of a request by any member of the court for a vote, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: s/Michael C. McGrail
Michael C. McGrail
Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 01-1240 **September Term, 2001**

This order was amended by order of 6/24/02
Filed On: June 21, 2002 [685104]

Citizen Power, Inc. and American Public Power Association,
Petitioners
v.
Federal Energy Regulatory Commission,
Respondent

Duquesne Light Company and FirstEnergy Corp.,
Intervenors

BEFORE: Edwards, Henderson and Rogers, Circuit Judges

O R D E R

Upon consideration of petitioner's petition for rehearing filed June 10, 2002, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: s/Michael C. McGrail
Michael C. McGrail
Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 01-1240 **September Term, 2001**

Filed On: June 24, 2002 [685294]

Citizen Power, Inc. and American Public Power Association,
Petitioners
v.
Federal Energy Regulatory Commission,
Respondent

Duquesne Light Company and FirstEnergy Corp.,
Intervenors

O R D E R

It is **ORDERED**, on the court's own motion, that the order filed June 21, 2002 denying petitioners' petition for rehearing be amended to reflect that the panel that considered the matter is Circuit Judges Edwards, Henderson and Garland.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: s/Michael C. McGrail
Michael C. McGrail
Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 01-1240 **September Term, 2001**

Filed On: August 8, 2002 [694432]

Citizen Power, Inc. and American Public Power Association,
Petitioners
v.
Federal Energy Regulatory Commission,
Respondent

Duquesne Light Company and FirstEnergy Corp.,
Intervenors

BEFORE: Edwards, Henderson and Garland, Circuit Judges

O R D E R

Upon consideration of petitioner's motion to publish unpublished panel decision, it is

ORDERED that the motion be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk
s/Michael C. McGrail
BY:
Michael C. McGrail
Deputy Clerk

APPENDIX D

STATUTORY PROVISIONS INVOLVED

SECTION 201 (16 USC §§ 824). Declaration of policy; application of subchapter

(a) Federal regulation of transmission and sale of electric energy

It is hereby declared that the business of transmitting and selling electric energy for ultimate distribution to the public is affected with a public interest, and that Federal regulation of matters relating to generation to the extent provided in this subchapter and subchapter III of this chapter and of that part of such business which consists of the transmission of electric energy in interstate commerce and the sale of such energy at wholesale in interstate commerce is necessary in the public interest, such Federal regulation, however, to extend only to those matters which are not subject to regulation by the States.

(b) Use or sale of electric energy in interstate commerce

(1) The provisions of this subchapter shall apply to the transmission of electric energy in interstate commerce and to the sale of electric energy at wholesale in interstate commerce, but except as provided in paragraph (2) shall not apply to any other sale of electric energy or deprive a State or State commission of its lawful authority now exercised over the exportation of hydroelectric energy which is transmitted across a State line. The Commission shall have jurisdiction over all facilities for such transmission or sale of electric energy, but shall not have jurisdiction, except as specifically provided in this subchapter and subchapter III of this chapter, over facilities used for the generation of electric energy or over facilities used in local distribution or

only for the transmission of electric energy in intrastate commerce, or over facilities for the transmission of electric energy consumed wholly by the transmitter.

(2) The provisions of sections 824i, 824j, and 824k of this title shall apply to the entities described in such provisions, and such entities shall be subject to the jurisdiction of the Commission for purposes of carrying out such provisions and for purposes of applying the enforcement authorities of this chapter with respect to such provisions. Compliance with any order of the Commission under the provisions of section 824i or 824j, shall not make an electric utility or other entity subject to the jurisdiction of the Commission for any purposes other than the purposes specified in the preceding sentence.

(c) Electric energy in interstate commerce

For the purpose of this subchapter, electric energy shall be held to be transmitted in interstate commerce if transmitted from a State and consumed at any point outside thereof; but only insofar as such transmission takes place within the United States.

(d) "Sale of electric energy at wholesale" defined

The term "sale of electric energy at wholesale" when used in this subchapter means a sale of electric energy to any person for resale.

(e) "Public utility" defined

The term "public utility" when used in this subchapter and subchapter II of this chapter means any person who owns or operates facilities subject to the jurisdiction of the

Commission under this subchapter (other than facilities subject to such jurisdiction solely by reason of section 824i, 824j, or 824K (of this title).

(f) United States, State, political subdivision of a State, or agency or instrumentality thereof exempt

No provision in this subchapter shall apply to, or be deemed to include, the United States, a State or any political subdivision of a State, or any agency, authority, or instrumentality of any one or more of the foregoing, or any corporation which is wholly owned, directly or indirectly, by any one or more of the foregoing, or any officer, agent, or employee of any of the foregoing acting as such in the course of his official duty, unless such provision makes specific reference thereto.

(g) Books and records

(1) Upon written order of a State commission, a State commission may examine the books, accounts, memoranda, contracts, and records of -

(A) an electric utility company subject to its regulatory authority under State law,

(B) any exempt wholesale generator selling energy at wholesale to such electric utility, and

(C) any electric utility company, or holding company thereof, which is an associate company or affiliate of an exempt wholesale generator which sells electric energy to an electric utility company referred to in subparagraph (A), wherever located, if such examination is required for the effective discharge of the State commission's regulatory responsibilities affecting the provision of electric service.

(2) Where a State commission issues an order pursuant to paragraph (1), the State commission shall not publicly disclose trade secrets or sensitive commercial information.

(3) Any United States district court located in the State in which the State commission referred to in paragraph (1) is located shall have jurisdiction to enforce compliance with this subsection.

(4) Nothing in this section shall--

(A) preempt applicable State law concerning the provision of records and other information; or

(B) in any way limit rights to obtain records and other information under Federal law, contracts, or otherwise.

(5) As used in this subsection the terms "affiliate", "associate company", "electric utility company", "holding company", "subsidiary company", and "exempt wholesale generator" shall have the same meaning as when used in the Public Utility Holding Company Act of 1935. (15 U.S.C. 79 et seq.).

SECTION 202 (16 USC §§ 824a). Interconnection and coordination of facilities; emergencies; transmission to foreign countries

(a) Regional districts; establishment; notice to State commissions

For the purpose of assuring an abundant supply of electric energy throughout the United States with the greatest

possible economy and with regard to the proper utilization and conservation of natural resources, the Commission is empowered and directed to divide the country into regional districts for the voluntary interconnection and coordination of facilities for the generation, transmission, and sale of electric energy, and it may at any time thereafter, upon its own motion or upon application, make such modifications thereof as in its judgment will promote the public interest. Each such district shall embrace an area which, in the judgment of the Commission, can economically be served by such interconnection and coordinated electric facilities. It shall be the duty of the Commission to promote and encourage such interconnection and coordination within each such district and between such districts. Before establishing any such district and fixing or modifying the boundaries thereof the Commission shall give notice to the State commission of each State situated wholly or in part within such district, and shall afford each such State commission reasonable opportunity to present its views and recommendations, and shall receive and consider such views and recommendations.

(b) Sale or exchange of energy; establishing physical connections

Whenever the Commission, upon application of any State commission or of any person engaged in the transmission or sale of electric energy, and after notice to each State commission and public utility affected and after opportunity for hearing, finds such action necessary or appropriate in the public interest it may by order direct a public utility (if the Commission finds that no undue burden will be placed upon such public utility thereby) to establish physical connection of its transmission facilities with the facilities of one or more other persons engaged in the transmission or sale of electric energy, to sell energy to or exchange energy with such

persons: Provided, That the Commission shall have no authority to compel the enlargement of generating facilities for such purposes, nor to compel such public utility to sell or exchange energy when to do so would impair its ability to render adequate service to its customers. The Commission may prescribe the terms and conditions of the arrangement to be made between the persons affected by any such order, including the apportionment of cost between them and the compensation or reimbursement reasonably due to any of them.

(c) Temporary connection and exchange of facilities during emergency

During the continuance of any war in which the United States is engaged, or whenever the Commission determines that an emergency exists by reason of a sudden increase in the demand for electric energy, or a shortage of electric energy or of facilities for the generation or transmission of electric energy or of fuel or water for generating facilities, or other causes, the Commission shall have authority, either upon its own motion or upon complaint, with or without notice, hearing, or report, to require by order such temporary connections of facilities and such generation, delivery, interchange, or transmission of electric energy as in its judgment will best meet the emergency and serve the public interest. If the parties affected by such order fail to agree upon the terms of any arrangement between them in carrying out such order, the Commission, after hearing held either before or after such order takes effect, may prescribe by supplemental order such terms as it finds to be just and reasonable, including the compensation or reimbursement which should be paid to or by any such party.

(d) Temporary connection during emergency by persons without jurisdiction of Commission

During the continuance of any emergency requiring immediate action, any person engaged in the transmission or sale of electric energy and not otherwise subject to the jurisdiction of the Commission may make such temporary connections with any public utility subject to the jurisdiction of the Commission or may construct such temporary facilities for the transmission of electric energy in interstate commerce as may be necessary or appropriate to meet such emergency, and shall not become subject to the jurisdiction of the Commission by reason of such temporary connection or temporary construction: Provided, That such temporary connection shall be discontinued or such temporary construction removed or otherwise disposed of upon the termination of such emergency: Provided further, That upon approval of the Commission permanent connections for emergency use only may be made hereunder.

(e) Transmission of electric energy to foreign country

After six months from August 26, 1935, no person shall transmit any electric energy from the United States to a foreign country without first having secured an order of the Commission authorizing it to do so. The Commission shall issue such order upon application unless, after opportunity for hearing, it finds that the proposed transmission would impair the sufficiency of electric supply within the United States or would impede or tend to impede the coordination in the public interest of facilities subject to the jurisdiction of the Commission. The Commission may by its order grant such application in whole or in part, with such modifications and upon such terms and conditions as the Commission may find necessary or appropriate, and may from time to time,

after opportunity for hearing and for good cause shown, make such supplemental orders in the premises as it may find necessary or appropriate.

(f) Transmission or sale at wholesale of electric energy; regulation

The ownership or operation of facilities for the transmission or sale at wholesale of electric energy which is (a) generated within a State and transmitted from that State across an international boundary and not thereafter transmitted into any other State, or (b) generated in a foreign country and transmitted across an international boundary into a State and not thereafter transmitted into any other State, shall not make a person a public utility subject to regulation as such under other provisions of this subchapter. The State within which any such facilities are located may regulate any such transaction insofar as such State regulation does not conflict with the exercise of the Commission's powers under or relating to subsection (e) of this section.

(g) Continuance of service

In order to insure continuity of service to customers of public utilities, the Commission shall require, by rule, each public utility to -

(1) report promptly to the Commission and any appropriate State regulatory authorities any anticipated shortage of electric energy or capacity which would affect such utility's capability of serving its wholesale customers,

(2) submit to the Commission, and to any appropriate State regulatory authority, and periodically revise, contingency plans respecting -

(A) shortages of electric energy or capacity, and

(B) circumstances which may result in such shortages, and

(3) accommodate any such shortages or circumstances in a manner which shall -

(A) give due consideration to the public health, safety, and welfare, and

(B) provide that all persons served directly or indirectly by such public utility will be treated, without undue prejudice or disadvantage.

SECTION 203 (16 USC §§ 824b). Disposition of property; consolidations; purchase of securities

(a) Authorizations

No public utility shall sell, lease, or otherwise dispose of the whole of its facilities subject to the jurisdiction of the Commission, or any part thereof of a value in excess of $ 50,000, or by any means whatsoever, directly or indirectly, merge or consolidate such facilities or any part thereof with those of any other person, or purchase, acquire, or take any security of any other public utility, without first having secured an order of the Commission authorizing it to do so. Upon application for such approval the Commission shall give reasonable notice in writing to the Governor and State commission of each of the States in which the physical property affected, or any part thereof, is situated, and to such other persons as it may deem advisable. After notice and opportunity for hearing, if the Commission finds that the proposed disposition, consolidation, acquisition, or control

will be consistent with the public interest, it shall approve the same.

(b) Orders of Commission

The Commission may grant any application for an order under this section in whole or in part and upon such terms and conditions as it finds necessary or appropriate to secure the maintenance of adequate service and the coordination in the public interest of facilities subject to the jurisdiction of the Commission. The Commission may from time to time for good cause shown make such orders supplemental to any order made under this section as it may find necessary or appropriate.

SECTION 205 (16 USC §§ 824d). Rates and charges; schedules; suspension of new rates; automatic adjustment clauses

(a) Just and reasonable rates

All rates and charges made, demanded, or received by any public utility for or in connection with the transmission or sale of electric energy subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges shall be just and reasonable, and any such rate or charge that is not just and reasonable is hereby declared to be unlawful.

(b) Preference or advantage unlawful

No public utility shall, with respect to any transmission or sale subject to the jurisdiction of the Commission, (1) make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or

disadvantage, or (2) maintain any unreasonable difference in rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service.

(c) Schedules

Under such rules and regulations as the Commission may prescribe, every public utility shall file with the Commission, within such time and in such form as the Commission may designate, and shall keep open in convenient form and place for public inspection schedules showing all rates and charges for any transmission or sale subject to the jurisdiction of the Commission, and the classifications, practices, and regulations affecting such rates and charges, together with all contracts which in any manner affect or relate to such rates, charges, classifications, and services.

(d) Notice required for rate changes

Unless the Commission otherwise orders, no change shall be made by any public utility in any such rate, charge, classification, or service, or in any rule, regulation, or contract relating thereto, except after sixty days' notice to the Commission and to the public. Such notice shall be given by filing with the Commission and keeping open for public inspection new schedules stating plainly the change or changes to be made in the schedule or schedules then in force and the time when the change or changes will go into effect. The Commission, for good cause shown, may allow changes to take effect without requiring the sixty days' notice herein provided for by an order specifying the changes so to be made and the time when they shall take effect and the manner in which they shall be filed and published.

(e) Suspension of new rates; hearings; five month period

Whenever any such new schedule is filed the Commission shall have authority, either upon complaint or upon its own initiative without complaint, at once, and, if it so orders, without answer or formal pleading by the public utility, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, charge, classification, or service; and, pending such hearing and the decision thereon, the Commission, upon filing with such schedules and delivering to the public utility affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate, charge, classification, or service, but not for a longer period than five months beyond the time when it would otherwise go into effect; and after full hearings, either completed before or after the rate, charge, classification, or service goes into effect, the Commission may make such orders with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made at the expiration of such five months, the proposed change of rate, charge, classification, or service shall go into effect at the end of such period, but in case of a proposed increased rate or charge, the Commission may by order require the interested public utility or public utilities to keep accurate account in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts are paid, and upon completion of the hearing and decision may by further order require such public utility or public utilities to refund, with interest, to the persons in whose behalf such amounts were paid, such portion of such increased rates or charges as by its decision shall be found not justified. At any hearing involving a rate or charge sought to be increased, the burden of proof to show that the increased rate or charge is

just and reasonable shall be upon the public utility, and the Commission shall give to the hearing and decision of such questions preference over other questions pending before it and decide the same as speedily as possible.

(f) Review of automatic adjustment clauses and public utility practices; action by Commission; "automatic adjustment clause" defined

(1) Not later than 2 years after November 9, 1978 and not less often than every 4 years thereafter, the Commission shall make a thorough review of automatic adjustment clauses in public utility rate schedules to examine -

(A) whether or not each such clause effectively provides incentives for efficient use of resources (including economical purchase and use of fuel and electric energy), and

(B) whether any such clause reflects any costs other than costs which are -

(i) subject to periodic fluctuations and

(ii) not susceptible to precise determinations in rate cases prior to the time such costs are incurred.

Such review may take place in individual rate proceedings or in generic or other separate proceedings applicable to one or more utilities.

(2) Not less frequently than every 2 years, in rate proceedings or in generic or other separate proceedings, the Commission shall review, with respect to each public utility, practices under any automatic adjustment clauses of such utility to insure

efficient use of resources (including economical purchase and use of fuel and electric energy) under such clauses.

(3) The Commission may, on its own motion or upon complaint, after an opportunity for an evidentiary hearing, order a public utility to -

(A) modify the terms and provisions of any automatic adjustment clause, or

(B) cease any practice in connection with the clause,

if clause or practice does not result in the economical purchase and use of fuel, electric energy, or other items, the cost of which is included in any rate schedule under an automatic adjustment clause.

(4) As used in this subsection, the term "automatic adjustment clause" means a provision of a rate schedule which provides for increases or decreases (or both), without prior hearing, in rates reflecting increases or decreases (or both) in costs incurred by an electric utility. Such term does not include any rate which takes effect subject to refund and subject to a later determination of the appropriate amount of such rate.

SECTION 206 (16 USC §§ 824e). Power of Commission to fix rates and charges; determination of cost of production or transmission

(a) Unjust or preferential rates, etc.; statement of reasons for changes; hearing; specification of issues

Whenever the Commission, after a hearing had upon its own motion or upon complaint, shall find that any rate, charge, or classification, demanded, observed, charged, or collected by any public utility for any transmission or sale subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order. Any complaint or motion of the Commission to initiate a proceeding under this section shall state the change or changes to be made in the rate, charge, classification, rule, regulation, practice, or contract then in force, and the reasons for any proposed change or changes therein. If, after review of any motion or complaint and answer, the Commission shall decide to hold a hearing, it shall fix by order the time and place of such hearing and shall specify the issues to be adjudicated.

(b) Refund effective date; preferential proceedings; statement of reasons for delay; burden of proof; scope of refund order; refund orders in cases of dilatory behavior; interest. Whenever the Commission institutes a proceeding under this section, the Commission shall establish a refund effective date. In the case of a proceeding instituted on complaint, the refund effective date shall not be earlier than the date 60 days after the filing of such complaint nor later than 5 months after the expiration of such 60-day period. In the case of a proceeding instituted by the Commission on its own motion, the refund effective date shall not be earlier than the date 60 days after the publication by the Commission of notice of its intention to initiate such proceeding nor later than 5 months after the expiration of such 60-day period. Upon institution

of a proceeding under this section, the Commission shall give to the decision of such proceeding the same preference as provided under section 824d of this title and otherwise act as speedily as possible. If no final decision is rendered by the refund effective date or by the conclusion of the 180-day period commencing upon initiation of a proceeding pursuant to this section, whichever is earlier, the Commission shall state the reasons why it has failed to do so and shall state its best estimate as to when it reasonably expects to make such decision. In any proceeding under this section, the burden of proof to show that any rate, charge, classification, rule, regulation, practice, or contract is unjust, unreasonable, unduly discriminatory, or preferential shall be upon the Commission or the complainant. At the conclusion of any proceeding under this section, the Commission may order the public utility to make refunds of any amounts paid, for the period subsequent to the refund effective date through a date fifteen months after such refund effective date, in excess of those which would have been paid under the just and reasonable rate, charge, classification, rule, regulation, practice, or contract which the Commission orders to be thereafter observed and in force: Provided, That if the proceeding is not concluded within fifteen months after the refund effective date and if the Commission determines at the conclusion of the proceeding that the proceeding was not resolved within the fifteen-month period primarily because of dilatory behavior by the public utility, the Commission may order refunds of any or all amounts paid for the period subsequent to the refund effective date and prior to the conclusion of the proceeding. The refunds shall be made, with interest, to those persons who have paid those rates or charges which are the subject of the proceeding.

(c) Refund considerations; shifting costs; reduction in revenues; "electric utility companies" and "registered holding company" defined

Notwithstanding subsection (b) of this section, in a proceeding commenced under this section involving two or more electric utility companies of a registered holding company, refunds which might otherwise be payable under subsection (b) of this section shall not be ordered to the extent that such refunds would result from any portion of a Commission order that (1) requires a decrease in system production or transmission costs to be paid by one or more of such electric companies; and (2) is based upon a determination that the amount of such decrease should be paid through an increase in the costs to be paid by other electric utility companies of such registered holding company: Provided, That refunds, in whole or in part, may be ordered by the Commission if it determines that the registered holding company would not experience any reduction in revenues which results from an inability of an electric utility company of the holding company to recover such increase in costs for the period between the refund effective date and the effective date of the Commission's order. For purposes of this subsection, the terms "electric utility companies" and "registered holding company" shall have the same meanings as provided in the Public Utility Holding Company Act of 1935, as amended (15 U.S.C. 79 et seq.).

(d) Investigation of costs

The Commission upon its own motion, or upon the request of any State commission whenever it can do so without prejudice to the efficient and proper conduct of its affairs, may investigate and determine the cost of the

production or transmission of electric energy by means of facilities under the jurisdiction of the Commission in cases where the Commission has no authority to establish a rate governing the sale of such energy.

SECTION 207 (16 USC §§ 824f). Ordering furnishing of adequate service

Whenever the Commission, upon complaint of a State commission, after notice to each State commission and public utility affected and after opportunity for hearing, shall find that any interstate service of any public utility is inadequate or insufficient, the Commission shall determine the proper, adequate, or sufficient service to be furnished, and shall fix the same by its order, rule, or regulation: Provided, That the Commission shall have no authority to compel the enlargement of generating facilities for such purposes, nor to compel the public utility to sell or exchange energy when to do so would impair its ability to render adequate service to its customers.

APPENDIX E

REGULATIONS INVOLVED

18 CFR
Conservation of Power and Water Resources
CHAPTER I
FEDERAL ENERGY REGULATORY COMMISSION, DEPARTMENT OF ENERGY

SUBCHAPTER B — REGULATIONS UNDER THE FEDERAL POWER ACT

PART 33 — APPLICATION FOR ACQUISITION, SALE, LEASE, OR OTHER DISPOSITION, MERGER OR CONSOLIDATION OF FACILITIES, OR FOR PURCHASE OR ACQUISITION OF SECURITIES OF A PUBLIC UTILITY

Sec.

33.1 Applicability.
33.2 Contents of application — general information requirements.
33.3 Additional information requirements for applications involving horizontal competitive impacts.
33.4 Additional information requirements for applications involving vertical competitive impacts.
33.5 Proposed accounting entries.
33.6 Form of notice.
33.7 Verification.
33.8 Number of copies.
33.9 Protective order.
33.10 Additional information.

Authority: 16 U.S.C. 791a-825r, 2601-2645; 31 U.S.C. 9701; 42 U.S.C. 7101-7352.

Source: Order 642, 65 FR 71014, Nov. 28, 2000, unless otherwise noted.

§33.1 Applicability.

(a) The requirements of this part will apply to any public utility seeking authority under section 203 of the Federal Power Act to:
(1) Dispose by sale, lease or otherwise of the whole of its facilities subject to Commission jurisdiction or any part thereof of a value in excess of $50,000;
(2) Merge or consolidate, directly or indirectly, facilities subject to Commission jurisdiction with those of any other person, if such facilities are of a value in excess of $50,000, including the acquisition of electric facilities used for the transmission or sale at wholesale of electric energy in interstate commerce which, except for ownership, would be subject to the Commission's jurisdiction; or
(3) Purchase, acquire or take any security of any other public utility.
(b) Value in excess of $50,000 as used in section 203 of the Federal Power Act (16 U.S.C. 824b) will be the original cost undepreciated as defined in the Commission's Uniform System of Accounts prescribed for public utilities and licensees in part 101 of this chapter.

§33.2 Contents of application — general information requirements.

Each applicant must include in its application, in the manner and form and in the order indicated, the following general information with respect to the applicant and each entity whose jurisdictional facilities or securities are involved:
(a) The exact name of the applicant and its principal business address.
(b) The name and address of the person authorized to receive notices and communications regarding the application, including phone and fax numbers, and E-mail addresses.
(c) A description of the applicant, including:

(1) All business activities of the applicant, including authorizations by charter or regulatory approval (to be identified as Exhibit A to the application);
(2) A list of all energy subsidiaries and energy affiliates, percentage ownership interest in such subsidiaries and affiliates, and a description of the primary business in which each energy subsidiary and affiliate is engaged (to be identified as Exhibit B to the application);
(3) Organizational charts depicting the applicant's current and proposed post-transaction corporate structures (including any pending authorized but not implemented changes) indicating all parent companies, energy subsidiaries and energy affiliates unless the applicant demonstrates that the proposed transaction does not affect the corporate structure of any party to the transaction (to be identified as Exhibit C to the application);
(4) A description of all joint ventures, strategic alliances, tolling arrangements or other business arrangements, including transfers of operational control of transmission facilities to Commission approved Regional Transmission Organizations, both current, and planned to occur within a year from the date of filing, to which the applicant or its parent companies, energy subsidiaries, and energy affiliates is a party, unless the applicant demonstrates that the proposed transaction does not affect any of its business interests (to be identified as Exhibit D to the application);
(5) The identity of common officers or directors of parties to the proposed transaction (to be identified as Exhibit E to the application); and
(6) A description and location of wholesale power sales customers and unbundled transmission services customers served by the applicant or its parent companies, subsidiaries, affiliates and associate companies (to be identified as Exhibit F to the application).

(d) A description of jurisdictional facilities owned, operated, or controlled by the applicant or its parent companies, subsidiaries, affiliates, and associate companies (to be identified as Exhibit G to the application).
(e) A narrative description of the proposed transaction for which Commission authorization is requested, including:
(1) The identity of all parties involved in the transaction;
(2) All jurisdictional facilities and securities associated with or affected by the transaction (to be identified as Exhibit H to the application);
(3) The consideration for the transaction; and
(4) The effect of the transaction on such jurisdictional facilities and securities.
(f) All contracts related to the proposed transaction together with copies of all other written instruments entered into or proposed to be entered into by the parties to the transaction (to be identified as Exhibit I to the application).
(g) A statement explaining the facts relied upon to demonstrate that the proposed transaction is consistent with the public interest. The applicant must include a general explanation of the effect of the transaction on competition, rates and regulation of the applicant by the Commission and state commissions with jurisdiction over any party to the transaction. The applicant should also file any other information it believes relevant to the Commission's consideration of the transaction. The applicant must supplement its application promptly to reflect in its analysis material changes that occur after the date a filing is made with the Commission, but before final Commission action. Such changes must be described and their effect on the analysis explained (to be identified as Exhibit J to the application).
(h) If the proposed transaction involves physical property of any party, the applicant must provide a general or key map

showing in different colors the properties of each party to the transaction (to be identified as Exhibit K to the application).
(i) If the applicant is required to obtain licenses, orders, or other approvals from other regulatory bodies in connection with the proposed transaction, the applicant must identify the regulatory bodies and indicate the status of other regulatory actions, and provide a copy of each order of those regulatory bodies that relates to the proposed transaction (to be identified as Exhibit L to the application). If the regulatory bodies issue orders pertaining to the proposed transaction after the date of filing with the Commission, and before the date of final Commission action, the applicant must supplement its Commission application promptly with a copy of these orders.

§33.3 Additional information requirements for applications involving horizontal competitive impacts.
(a)(1) The applicant must file the horizontal Competitive Analysis Screen described in paragraphs (b) through (f) of this section if, as a result of the proposed transaction, a single corporate entity obtains ownership or control over the generating facilities of previously unaffiliated merging entities (for purposes of this section, merging entities means any party to the proposed transaction or its parent companies, energy subsidiaries or energy affiliates).
(2) A horizontal Competitive Analysis Screen need not be filed if the applicant:
(i) Affirmatively demonstrates that the merging entities do not currently conduct business in the same geographic markets or that the extent of the business transactions in the same geographic markets is *de minimis;* and

(ii) No intervenor has alleged that one of the merging entities is a perceived potential competitor in the same geographic market as the other.

(b) All data, assumptions, techniques and conclusions in the horizontal Competitive Analysis Screen must be accompanied by appropriate documentation and support.

(1) If the applicant is unable to provide any specific data required in this section, it must identify and explain how the data requirement was satisfied and the suitability of the substitute data.

(2) The applicant may provide other analyses for defining relevant markets (*e.g.* the Hypothetical Monopolist Test with or without the assumption of price discrimination) in addition to the delivered price test under the horizontal Competitive Analysis Screen.

(3) The applicant may use a computer model to complete one or more steps in the horizontal Competitive Analysis Screen. The applicant must fully explain, justify and document any model used and provide descriptions of model formulation, mathematical specifications, solution algorithms, as well as the annotated model code in executable form, and specify the software needed to execute the model. The applicant must explain and document how inputs were developed, the assumptions underlying such inputs and any adjustments made to published data that are used as inputs. The applicant must also explain how it tested the predictive value of the model, for example, using historical data.

(c) The horizontal Competitive Analysis Screen must be completed using the following steps:

(1) *Define relevant products.* Identify and define all wholesale electricity products sold by the merging entities during the two years prior to the date of the application, including, but not limited to, non-firm energy, short-term capacity (or firm energy), long-term capacity (a contractual

commitment of more than one year), and ancillary services (specifically spinning reserves, non-spinning reserves, and imbalance energy, identified and defined separately). Because demand and supply conditions for a product can vary substantially over the year, periods corresponding to those distinct conditions must be identified by load level, and analyzed as separate products.

(2) *Identify destination markets.* Identify each wholesale power sales customer or set of customers (destination market) affected by the proposed transaction. Affected customers are, at a minimum, those entities directly interconnected to any of the merging entities and entities that have purchased electricity at wholesale from any of the merging entities during the two years prior to the date of the application. If the applicant does not identify an entity to whom the merging entities have sold electricity during the last two years as an affected customer, the applicant must provide a full explanation for each exclusion.

(3) *Identify potential suppliers.* The applicant must identify potential suppliers to each destination market using the delivered price test described in paragraph (c)(4) of this section. A seller may be included in a geographic market to the extent that it can economically and physically deliver generation services to the destination market.

(4) *Perform delivered price test.* For each destination market, the applicant must calculate the amount of relevant product a potential supplier could deliver to the destination market from owned or controlled capacity at a price, including applicable transmission prices, loss factors and ancillary services costs, that is no more than five (5) percent above the pre-transaction market clearing price in the destination market.

(i) *Supplier's presence.* The applicant must measure each potential supplier's presence in the destination market in

terms of generating capacity, using economic capacity and available economic capacity measures. Additional adjustments to supplier presence may be presented; applicants must support any such adjustment.

(A) *Economic capacity* means the amount of generating capacity owned or controlled by a potential supplier with variable costs low enough that energy from such capacity could be economically delivered to the destination market. Prior to applying the delivered price test, the generating capacity meeting this definition must be adjusted by subtracting capacity committed under long-term firm sales contracts and adding capacity acquired under long-term firm purchase contracts (*i.e.,* contracts with a remaining commitment of more than one year). The capacity associated with any such adjustments must be attributed to the party that has authority to decide when generating resources are available for operation. Other generating capacity may also be attributed to another supplier based on operational control criteria as deemed necessary, but the applicant must explain the reasons for doing so.

(B) *Available economic capacity* means the amount of generating capacity meeting the definition of economic capacity less the amount of generating capacity needed to serve the potential supplier's native load commitments, as described in paragraph (d)(4)(i) of this section.

(C) *Available transmission capacity.* Each potential supplier's economic capacity and available economic capacity (and any other measure used to determine the amount of relevant product that could be delivered to a destination market) must be adjusted to reflect available transmission capability to deliver each relevant product. The allocation to a potential supplier of limited capability of constrained transmission paths internal to the merging entities' systems or interconnecting the systems with other control areas must

recognize both the transmission capability not subject to firm reservations by others and any firm transmission rights held by the potential supplier that are not committed to long-term transactions. For each such instance where limited transmission capability must be allocated among potential suppliers, the applicant must explain the method used and show the results of such allocation.

(D) *Internal interface.* If the proposed transaction would cause an interface that interconnects the transmission systems of the merging entities to become transmission facilities for which the merging entities would have a "native load" priority under their open access transmission tariff (*i.e.*, where the merging entities may reserve existing transmission capacity needed for native load growth and network transmission customer load growth reasonable forecasted within the utility's current planning horizon), all of the unreserved capability of the interface must be allocated to the merging entities for purposes of the horizontal Competitive Analysis Screen, unless the applicant demonstrates one of the following:

(*1*) The merging entities would not have adequate economic capacity to fully use such unreserved transmission capability;

(*2*) The merging entities have committed a portion of the interface capability to third parties; or

(*3*) Suppliers other than the merging entities have purchased a portion of the interface capability.

(ii) [Reserved]

(5) *Calculate market concentration.* The applicant must calculate the market share, both pre- and post-merger, for each potential supplier, the Herfindahl-Hirschman Index (HHI) statistic for the market, and the change in the HHI statistic. (The HHI statistic is a measure of market concentration and is a function of the number of firms in a market and their respective market shares. The HHI statistic

is calculated by summing the squares of the individual market shares, expressed as percentages, of all potential suppliers to the destination market.) To make these calculations, the applicant must use the amounts of generating capacity (*i.e.,* economic capacity and available economic capacity, and any other relevant measure) determined in paragraph (c)(4)(i) of this section, for each product in each destination market.

(6) *Provide historical transaction data.* The applicant must provide historical trade data and historical transmission data to corroborate the results of the horizontal Competitive Analysis Screen. The data must cover the two-year period preceding the filing of the application. The applicant may adjust the results of the horizontal Competitive Analysis Screen, if supported by historical trade data or historical transmission service data. Any adjusted results must be shown separately, along with an explanation of all adjustments to the results of the horizontal Competitive Analysis Screen. The applicant must also provide an explanation of any significant differences between results obtained by the horizontal Competitive Analysis Screen and trade patterns in the last two years.

(d) In support of the delivered price test required by paragraph (c)(4) of this section, the applicant must provide the following data and information used in calculating the economic capacity and available economic capacity that a potential supplier could deliver to a destination market. The transmission data required by paragraphs (d)(7) through (d)(9) of this section must be supplied for the merging entities' systems. The transmission data must also be supplied for other relevant systems, to the extent data are publicly available.

(1) *Generation capacity.* For each generating plant or unit owned or controlled by each potential supplier, the applicant must provide:
(i) Supplier name;
(ii) Name of the plant or unit;
(iii) Primary and secondary fuel-types;
(iv) Nameplate capacity;
(v) Summer and winter total capacity; and
(vi) Summer and winter capacity adjusted to reflect planned and forced outages and other factors, such as fuel supply and environmental restrictions.
(2) *Variable cost.* For each generating plant or unit owned or controlled by each potential supplier, the applicant must also provide variable cost components.
(i) These cost components must include at a minimum:
(A) Variable operation and maintenance, including both fuel and non-fuel operation and maintenance; and
(B) Environmental compliance.
(ii) To the extent costs described in paragraph (d)(2)(i) of this section are allocated among units at the same plant, allocation methods must be fully described.
(3) *Long-term purchase and sales data.* For each sale and purchase of capacity, the applicant must provide the following information:
(i) Purchasing entity name;
(ii) Selling entity name;
(iii) Duration of the contract;
(iv) Remaining contract term and any evergreen provisions;
(v) Provisions regarding renewal of the contract;
(vi) Priority or degree of interruptibility;
(vii) FERC rate schedule number, if applicable;
(viii) Quantity and price of capacity and/or energy purchased or sold under the contract; and

(ix) Information on provisions of contracts which confer operational control over generation resources to the purchaser.

(4) *Native load commitments.*

(i) Native load commitments are commitments to serve wholesale and retail power customers on whose behalf the potential supplier, by statute, franchise, regulatory requirement, or contract, has undertaken an obligation to construct and operate its system to meet their reliable electricity needs.

(ii) The applicant must provide supplier name and hourly native load commitments for the most recent two years. In addition, the applicant must provide this information for each load level, if load-differentiated relevant products are analyzed.

(iii) If data on native load commitments are not available, the applicant must fully explain and justify any estimates of these commitments.

(5) *Transmission and ancillary service prices, and loss factors.*

(i) The applicant must use in the horizontal Competitive Analysis Screen the maximum rates stated in the transmission providers' tariffs. If necessary, those rates should be converted to a dollars-per-megawatt hour basis and the conversion method explained.

(ii) If a regional transmission pricing regime is in effect that departs from system-specific transmission rates, the horizontal Competitive Analysis Screen must reflect the regional pricing regime.

(iii) The following data must be provided for each transmission system that would be used to deliver energy from each potential supplier to a destination market:

(A) Supplier name;

(B) Name of transmission system;

(C) Firm point-to-point rate;
(D) Non-firm point-to-point rate;
(E) Scheduling, system control and dispatch rate;
(F) Reactive power/voltage control rate;
(G) Transmission loss factor; and
(H) Estimated cost of supplying energy losses.
(iv) The applicant may present additional alternative analysis using discount prices if the applicant can support it with evidence that discounting is and will be available.
(6) *Destination market price.* The applicant must provide, for each relevant product and destination market, market prices for the most recent two years. The applicant may provide suitable proxies for market prices if actual market prices are unavailable. Estimated prices or price ranges must be supported and the data and approach used to estimate the prices must be included with the application. If the applicant relies on price ranges in the analysis, such ranges must be reconciled with any actual market prices that are supplied in the application. Applicants must demonstrate that the results of the analysis do not vary significantly in response to small variations in actual and/or estimated prices.
(7) *Transmission capability.*
(i) The applicant must provide simultaneous transfer capability data, if available, for each of the transmission paths, interfaces, or other facilities used by suppliers to deliver to the destination markets on an hourly basis for the most recent two years.
(ii) Transmission capability data must include the following information:
(A) Transmission path, interface, or facility name;
(B) Total transfer capability (TTC); and
(C) Firm available transmission capability (ATC).

(iii) Any estimated transmission capability must be supported and the data and approach used to make the estimates must be included with the application.

(8) *Transmission constraints.*

(i) For each existing transmission facility that affects supplies to the destination markets and that has been constrained during the most recent two years or is expected to be constrained within the planning horizon, the applicant must provide the following information:

(A) Name of all paths, interfaces, or facilities affected by the constraint;

(B) Locations of the constraint and all paths, interfaces, or facilities affected by the constraint;

(C) Hours of the year when the transmission constraint is binding; and

(D) The system conditions under which the constraint is binding.

(ii) The applicant must include information regarding expected changes in loadings on transmission facilities due to the proposed transaction and the consequent effect on transfer capability.

(iii) To the extent possible, the applicant must provide system maps showing the location of transmission facilities where binding constraints have been known or are expected to occur.

(9) *Firm transmission rights (Physical and Financial).* For each potential supplier to a destination market that holds firm transmission rights necessary to directly or indirectly deliver energy to that market, or that holds transmission congestion contracts, the applicant must provide the following information:

(i) Supplier name;

(ii) Name of transmission path interface, or facility;

(iii) The FERC rate schedule number, if applicable, under which transmission service is provided; and
(iv) A description of the firm transmission rights held (including, at a minimum, quantity and remaining time the rights will be held, and any relevant time restrictions on transmission use, such as peak or off-peak rights).
(10) *Summary table of potential suppliers' presence.*
(i) The applicant must provide a summary table with the following information for each potential supplier for each destination market:
(A) Potential supplier name;
(B) The potential supplier's total amount of economic capacity (not subject to transmission constraints); and
(C) The potential supplier's amount of economic capacity from which energy can be delivered to the destination market (after adjusting for transmission availability).
(ii) A similar table must be provided for available economic capacity, and for any other generating capacity measure used by the applicant.
(11) *Historical trade data.*
(i) The applicant must provide data identifying all of the merging entities' wholesale sales and purchases of electric energy for the most recent two years.
(ii) The applicant must include the following information for each transition:
(A) Type of transaction (such as non-firm, short-term firm, long-term firm, peak, off-peak, etc.);
(B) Name of purchaser;
(C) Name of seller;
(D) Date, duration and time period of the transaction;
(E) Quantity of energy purchased or sold;
(F) Energy charge per unit;
(G) Megawatt hours purchased or sold;
(H) Price; and

(I) The delivery points used to effect the sale or purchase.
(12) *Historical transmission data.* The applicant must provide information concerning any transmission service denials, interruptions and curtailments on the merging entities' systems, for the most recent two years, to the extent the information is available from OASIS data, including the following information:
(i) Name of the customer denied, interrupted or curtailed;
(ii) Type, quantity and duration of service at issue;
(iii) The date and period of time involved;
(iv) Reason given for the denial, interruption or curtailment;
(v) The transmission path; and
(vi) The reservations or other use anticipated on the affected transmission path at the time of the service denial, curtailment or interruption.
(e) *Mitigation.* Any mitigation measures proposed by the applicant (including, for example, divestiture or participation in a regional transmission organization) which are intended to mitigate the adverse effect of the proposed transaction must, to the extent possible, be factored into the horizontal Competitive Analysis Screen as an additional post-transaction analysis. Any mitigation commitments that involve facilities (*e.g.,* in connection with divestiture of generation) must identify the facilities affected by the commitment, along with a timetable for implementing the commitments.
(f) *Additional factors.* If the applicant does not propose mitigation, the applicant must address:
(1) The potential adverse competitive effects of the transaction.
(2) The potential for entry in the market and the role that entry could play in mitigating adverse competitive effects of the transaction;

(3) The efficiency gains that reasonably could not be achieved by other means; and
(4) Whether, but for the transaction, one or more of the merging entities would be likely to fail, causing its assets to exit the market.
[65 FR 71014, Nov. 28, 2000; 65 FR 76005, Dec. 5, 2000]

§33.4 Additional information requirements for applications involving vertical competitive impacts.
(a)(1) The applicant must file the vertical Competitive Analysis described in paragraphs (b) through (e) of this section if, as a result of the proposed transaction, a single corporate entity has ownership or control over one or more merging entities that provides inputs to electricity products and one or more merging entities that provides electric generation products (for purposes of this section, merging entities means any party to the proposed transaction or its parent companies, energy subsidiaries or energy affiliates).
(2) A vertical Competitive Analysis need not be filed if the applicant can affirmatively demonstrate that:
(i) The merging entities currently do not provide inputs to electricity products (*i.e.*, upstream relevant products) and electricity products (*i.e.*, downstream relevant products) in the same geographic markets or that the extent of the business transactions in the same geographic market is *de minimis*; and no intervenor has alleged that one of the merging entities is a perceived potential competitor in the same geographic market as the other.
(ii) The extent of the upstream relevant products currently provided by the merging entities is used to produce a *de minimis* amount of the relevant downstream products in the

relevant destination markets, as defined in paragraph (c)(2) of §33.3.

(b) All data, assumptions, techniques and conclusions in the vertical Competitive Analysis must be accompanied by appropriate documentation and support.

(c) The vertical Competitive Analysis must be completed using the following steps:

(1) *Define relevant products* — (i) *Downstream relevant products.* The applicant must identify and define as downstream relevant products all products sold by merging entities in relevant downstream geographic markets, as outlined in paragraph (c)(1) of §33.3.

(ii) *Upstream relevant products.* The applicant must identify and define as upstream relevant products all inputs to electricity products provided by upstream merging entities in the most recent two years.

(2) *Define geographic markets* — (i) *Downstream geographic markets.* The applicant must identify all geographic markets in which it or any merging entities sell the downstream relevant products, as outlined in paragraphs (c)(2) and (c)(3) of §33.3.

(ii) *Upstream geographic markets* The applicant must identify all geographic markets in which it or any merging entities provide the upstream relevant products.

(3) *Analyze competitive conditions* — (i) *Downstream geographic market.*

(A) The applicant must compute market share for each supplier in each relevant downstream geographic market and the HHI statistic for the downstream market. The applicant must provide a summary table with the following information for each relevant downstream geographic market:

(*1*) The economic capacity of each downstream supplier (specify the amount of such capacity served by each upstream supplier);
(*2*) The total amount of economic capacity in the downstream market served by each upstream supplier;
(*3*) The market share of economic capacity served by each upstream supplier; and
(*4*) The HHI statistic for the downstream market.
(B) A similar table must be provided for available economic capacity and for any other measure used by the applicant.
(ii) *Upstream geographic market.* The applicant must provide a summary table with the following information for each upstream relevant product in each relevant upstream geographic market:
(A) The amount of relevant product provided by each upstream supplier;
(B) The total amount of relevant product in the market;
(C) The market share of each upstream supplier; and
(D) The HHI statistic for the upstream market.
(d) *Mitigation.* Any mitigation measures proposed by the applicant (including, for example, divestiture or participation in an Regional Transmission Organization) which are intended to mitigate the adverse effect of the proposed transaction must, to the extent possible, be factored into the vertical competitive analysis as an additional post-transaction analysis. Any mitigation measures that involve facilities must identify the facilities affected by the commitment.
(e) *Additional factors.*
(1) If the applicant does not propose mitigation measures, the applicant must address:
(i) The potential adverse competitive effects of the transaction.

(ii) The potential for entry in the market and the role that entry could play in mitigating adverse competitive effects of the transaction;
(iii) The efficiency gains that reasonably could not be achieved by other means; and
(iv) Whether, but for the proposed transaction, one or more of the parties to the transaction would be likely to fail, causing its assets to exit the market.
(2) The applicant must address each of the additional factors in the context of whether the proposed transaction is likely to present concerns about raising rivals' costs or anticompetitive coordination.

§33.5 Proposed accounting entries.

If the applicant is required to maintain its books of account in accordance with the Commission's Uniform System of Accounts in part 101 of this chapter, the applicant must present proposed accounting entries showing the effect of the transaction with sufficient detail to indicate the effects on all account balances (including amounts transferred on an interim basis), the effect on the income statement, and the effects on other relevant financial statements. The applicant must also explain how the amount of each entry was determined.

§33.6 Form of notice.

The applicant must file a form of notice of the application suitable for issuance in the FEDERAL REGISTER, as well as a copy of the same notice in electronic format in WordPerfect 6.1 (or other electronic format the Commission may designate) on a 3 ½" diskette marked with the name of the applicant and the words "Notice of Application." The Notice of Filing must appear in the following form:

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY
COMMISSION

[Full Name of Applicant(s)]

Docket No. XXXX-XXX-XXX

NOTICE OF FILING

Take notice that on [Date of filing], [Applicant(s)] filed with the Federal Energy Regulatory Commission an application pursuant to section 203 of the Federal Power Act for authorization of a disposition of jurisdictional facilities whereby [describe the transaction for which authorization is sought, clearly identifying the jurisdictional facilities being disposed of, the entity(s) disposing of the facilities, the entity(s) acquiring/leasing the facilities and (briefly) how the disposition will be accomplished (*e.g.*, by stock transfer or a cash sale)]. [If the disposition of jurisdictional facilities is directly related to the disposition of generation assets, identify those generation assets and their total nameplate generation capacity in Megawatts. If authorization is needed for both the sale and the purchase of the jurisdictional facilities, this should be clearly stated in this paragraph of the notice. If the application involves a merger, the applicant should clearly indicate this in the draft notice. If the application contained a request for privileged treatment by the Commission, state this fact in this paragraph of the notice.]

Any person desiring to be heard or to protest such filing should file a motion to intervene or protest with the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, in accordance with Rules 211 and

214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214). All such motions and protests should be filed on or before _____. Protests will be considered by the Commission to determine the appropriate action to be taken, but will not serve to make protestants parties to the proceedings. Any person wishing to become a party must file a motion to intervene. Copies of this filing are on file with the Commission and are available for public inspection. This filing may also be viewed on the Internet at http://www.ferc.fed.us/online/rims.htm (call 202-208-2222 for assistance).
Secretary

The Commission may require the applicant to give such local notice by publication as the Commission in its discretion may deem proper.

§33.7 Verification.

The original application must be signed by a person or persons having authority with respect thereto and having knowledge of the matters therein set forth, and must be verified under oath.

§33.8 Number of copies.

An original and eight copies of the application under this part must be submitted. If the applicant submits a public and a non-public version (containing information filed under a request for privileged treatment), the original and at least three of the eight copies must be of the non-public version of the filing, pursuant to §388.112(b)(ii). If the applicant must submit information specified in paragraphs (b), (c), (d), (e)

and (f) of §33.3 or paragraphs (b), (c), (d) and (e) of §33.4, the applicant must submit all such information in electronic format (*e.g.*, on computer diskette or on CD) along with a printed description and summary. The electronic version must be submitted in accordance with §385.2011 of the Commission's regulations. The printed portion of the applicant's submission must include documentation for the electronic submission, including all file names and a summary of the data contained in each file. Each column (or data item) in each separate data table or chart must be clearly labeled in accordance with the requirements of §33.3 and §33.4. Any units of measurement associated with numeric entries must also be included.

§33.9 Protective order.

If the applicant seeks to protect any portion of the application, or any attachment thereto, from public disclosure pursuant to §388.112 of this chapter, the applicant must include with its request for privileged treatment a proposed protective order under which the parties to the proceeding will be able to review any of the data, information, analysis or other documentation relied upon by the applicant for which privileged treatment is sought.

§33.10 Additional information.

The Director of the Office of Markets, Tariffs and Rates, or his designee, may, by letter, require the applicant to submit additional information as is needed for analysis of an application filed under this part.

PART 35—FILING OF RATE SCHEDULES

§ 35.27 Power sales at market-based rates.

(a) Notwithstanding any other requirements, any public utility seeking authorization to engage in sales for resale of electric energy at market-based rates shall not be required to demonstrate any lack of market power in generation with respect to sales from capacity for which construction has commenced on or after July 9, 1996.

(b) Nothing in this part —

(1) Shall be construed as preempting or affecting any jurisdiction a state commission or other state authority may have under applicable state and federal law, or

(2) Limits the authority of a state commission in accordance with state and federal law to establish

(i) Competitive procedures for the acquisition of electric energy, including demand-side management, purchased at wholesale, or

(ii) Non-discriminatory fees for the distribution of such electric energy to retail consumers for purposes established in accordance with state law.

[Order 888, 61 FR 21693, May 10, 1996]

APPENDIX F

LEGISLATIVE HISTORY

Conference Report to Accompany S.2796, H. Rep. No. 1903, 74th Cong., 1st Sess., 74 (Aug. 23, 1935), *reprinted at* 79 Cong. Rec. H14621 (Aug. 23, 1935)

Hearings Regarding H.R. 5423 (to Amend the Federal Water Power Act) before House Interstate and Foreign Commerce Comm., 74th Cong., 549-550, 560 (1935) (Testimony of Federal Power Commission Solicitor Devane).

Part II

The Senate bill in section 201 (a) contained a somewhat more lengthy declaration of policy than the House amendment, the only material difference being that the House amendment contained no reference to "generation" of electric energy which appeared in the Senate bill. The conference substitute follows the language of the House amendment but inserts a clause relating to generation to the extent regulation thereof is provided for in this part and the part next following. The House amendment and conference substitute also make reference to the "sale of electric energy at wholesale in interstate commerce", which reference did not appear in the Senate bill. The same general differences between the Senate bill and the House amendment also appear in section 201 (b) and the language of the House amendment has been followed with a clarifying phrase added to remove any doubt as to the Commission's jurisdiction over facilities used for the generation and local distribution of electric energy to the extent provided in other sections of this part and the part next following.

The House amendment to section 202 (a) constituted in part a restatement in modified language of similar provisions of the Senate bill. The House amendment also authorized the Commission to modify the boundaries of regional districts when in its judgment the public interest so required. The House amendment placed a positive duty upon the Commission to promote and encourage voluntary interconnection. The House amendment with minor modifications is adopted in the conference substitute.

The Senate bill by subsection (c) of section 202 authorized the Commission to require interconnection for emergency purposes. The House amendment authorized emergency interstate interconnection or permanent interstate interconnection for emergency use only without subjecting such companies to the other provisions of the act. The conference substitute contains both provisions.

The Senate bill, section 203 (a), provided that a public utility could not dispose of its interstate facilities or any part thereof of a value in excess of $25,000 without Commission order, and in the following subsection required a Commission order for the acquisition of any security of any other public utility. The House amendment combined these two subsections, required Commission approval where the value is $100,000 or more, and required a hearing upon any application for such approval. The conference substitute follows the House amendment, but reduces the amount of the exception to $50,000 and requires opportunity for hearing rather than compulsory hearing in every instance. The Senate bill authorized the Commission to attach conditions which would avoid the creation of relationships detrimental to the public interests or the interests of investors or consumers. These two latter provisions were omitted from the House amendment. The conference substitute omits the former, but adopts the latter provision.

* * *

SAM RAYBURN,
GEORGE HUDDLESTON,
CLARENCE LEA,

Managers on the part of the House

[*549] MR. DEVANE. Well, I should not say it, but you discouraged me. After so many efforts to make it clear I feel that probably someone else could do it better than I can; but let me state it again.
MR. BULWINKLE. All right.
MR. DEVANE. Insofar as rates are concerned—
MR. BULWINKLE. Wait a minute. Maybe we can get what is the main objective point to title II.
MR. DEVANE. Yes; Federal and State cooperation and interconnections are the main advantages, throughout this bill.
MR. BULWINKLE. I am not talking about advantages. What are the great objectives sought by the passage of title II of this bill?
MR. DEVANE. Two objectives are sought by the passage of this bill.
MR. BULWINKLE. Let us get those.
MR. DEVANE. One objective is complement to State regulation of rates. The second objective is regional coordination and the bringing of these properties together in systems in these regions. Those are the two main objectives of this bill.
MR. BULWINKLE. Well, then, the other thing is not considered at all—the wholesale—the right of the Federal Power Commission to regulate the wholesale price of the transmission?
MR. DEVANE. That is a part of the first objective of the bill.
The first objective of the bill is a complement to State regulation of rates, and as a part of that complement the bill provides that the Federal Power Commission may regulate the rates that no State commission can regulate. The bill simply fills this gap and that is all.
MR. BULWINKLE. And that is all that you are asking?
MR. DEVANE. That is all, insofar as the rates are concerned.
MR. BULWINKLE. All right.

MR. DEVANE. Now, when you are talking about rates, that is all; we simply fill the gap. I want that clearly understood, that that is all insofar as rates are concerned.

The second objection is the creation of regional integrated systems so as to secure the best service to the public.

MR. BULWINKLE. Well, then, the question comes to mind, has the public not been served?

MR. DEVANE. Oh, the public has been served, but do you mean, has it been served to the best advantage?

MR. BULWINKLE. To the best advantage.

MR. DEVANE. No.

MR. BULWINKLE. In what respect; have their rates been too high?

MR. DEVANE. I think so. I think you have a fairly good answer to that in what has happened in the last 18 months. I think there has been a reduction in rates in the last 18 months amounting to an annual reduction of between 35 and 40 million dollars. To a very large degree these reductions have been voluntary on the part of the industry. I think that is a fairly good answer to your question.

MR. PETTENGILL. Mr. DeVane, I would like to ask your construction of the word "operate" in line 4, page 107. Now, that reads:

> No public utility shall undertake the construction of extension of any facilities subject to the jurisdiction of the Commission or acquire or operate any such facilities,—

without getting a certificate of public convenience.

[*550] Would that apply to facilities already existing?

MR. DEVANE. Will it apply to existing facilities?

MR. PETTENGILL. Yes; the word "operate."

MR. DEVANE. Your reference to the word "operate" goes along with the word "acquire". That is, it relates to facilities not previously owned or controlled.

MR. PETTENGILL. Well, it is not your intention to require a certificate of public convenience from existing companies to operate their existing facilities?

MR. DEVANE. No; not at all; not at all, sir. That wording is not intended to require that, and if there is any need for clarification of that, I ask that it be done, because it only applies to those facilities that might be acquired.
MR. COOPER. Mr. DeVane, may I ask you a question?
MR. DEVANE. Yes, sir.
MR. COOPER. I believe you stated a moment ago that this bill gives to the Federal Power Commission power to regulate electric energy transmitted in interstate commerce for wholesale purposes, and the production facilities?
MR. DEVANE. And the transmission facilities used in transmitting the energy.
MR. COOPER. You said production.
MR. DEVANE. Production and transmission; yes, sir.
MR. COOPER. All right now. Supposing here was an industry, 10 percent of whose business was interstate, and 90 percent was intrastate; the 10 percent interstate still gives you the power to regulate it, notwithstanding that 90 percent is intrastate, you can regulate that industry?
MR. DEVANE. It gives the Commission control over interstate transmission facilities.
MR. COOPER. And you said production.
MR. DEVANE. Coming into that, it gives the Commission jurisdiction over production facilities connected with the interstate transmission facilities.
In that respect, may I say Mr. Cooper, that it is in entire accord with every other piece of regulatory regulation Congress ever passed?
MR. COOPER. Let us understand this right now; not withstanding 90 percent of the business is intrastate and 10 percent is interstate, this bill gives you the power to regulate the entire production of the industry?
MR. DEVANE. Yes, sir.
Less than 5 percent of the telephone industry is interstate.

***

[*560]

***

MR. DEVANE. Now, just briefly, I wish to say that section 204, section 205, and section 206 are written into this bill to carry out the regional coordination plan that is provided in section 202 and section 203.

These sections are absolutely necessary to effectively carry out regional planning and coordination.

Now, the provision in section 205 with reference to consolidation is very important when considered in connection with title I of this bill. Whatever regulation there is of holding companies, whatever form the legislation may eventually take, it is, in our judgment, very important to see that the unscrambling of the holding company properties is properly done in the public interest.

To have legislation of this kind enacted at the same time legislation of the character carried in title I is enacted is important, because whatever form title I takes, there is going to be a realinement in this industry and steps should be taken now to protect the public against an uneconomic realinement.

It is perfectly obvious to me that the securities of utilities doing an interstate business should be regulated by a commission that has jurisdiction over the property in all the States in which the utility operates.

And in that respect, you are not blazing a new trail in regulation. This legislation is similar to the legislation that passed with reference to the railroads. Eventually Congress passed railroad legislation that took from the State commissions all jurisdiction over the securities of railroad corporations, but for many years both agencies had jurisdiction. And, this law is in that respect the same as it was in the beginning for railroads.

The instances I have just mentioned are the only instances in this bill, except one I am going to mention in a minute, where it might be even argued that there is any encroachment upon State authority. We do not prohibit the authority of the States in any of these matters, but we do confer authority

upon the Commission with reference to the same matters. This authority is absolutely necessary if the provisions of section 203 are to be effectively carried out.

MR. WADSWORTH. Would there be conflict between the Securities Exchange Commission and your Commission?

MR. DEVANE. No, sir; there would be no conflict. You may say there might be some duplication. The company would go through with the requirement of the Securities Exchange Commission just the same.

MR. MAPES. Of course, if title I should be enacted into law there would not be any particular occasion for 205 (b) after January 1, 1940, would there?

MR. DEVANE. Until after that time?

APPENDIX G

EXCERPTS FROM
FERC APPELLATE BRIEF BELOW

* * *

[*17]

A. Generation Facilities Do Not Become Facilities Generally "Subject to the Jurisdiction of the Commission" Under § 203 By Virtue of Limited Jurisdiction Specifically Provided Elsewhere in the Statute.

Petitioners contend that, because certain limited jurisdiction over generation facilities is provided in various sections of the FPA, generation facilities are therefore [*18] facilities generally "subject to the jurisdiction of the Commission" for purposes of § 203. *See* Br. at 18-19. Clearly, the FPA does elsewhere "specifically provide" for certain Commission jurisdiction over generation. As Petitioners observe, for example, § 207, 16 U.S.C. § 824f, authorizes the Commission in certain circumstances to compel the operation of generating facilities. *See* Br. at 19.[4] However, the presence of limited grants of authority elsewhere in the statute does not render generation facilities broadly "jurisdictional" for purposes of § 203. As this Court found in *Duke Power.*

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[4] *See also, e.g.*, § 210(a)(1)(A) (empowering Commission to order the physical connection of, *inter alia*, an applicant's generation facilities with any cogeneration facility, small power production facility, or the transmission facilities of any electric utility); § 214 (empowering Commission to declare unlawful under § 205 a rate charged by an exempt wholesale generator that results from the receipt of an undue preference from an affiliate); § 301(a) (empowering Commission to require every licensee and public utility to keep records, including records of generation, the furnishing or services or facilities in connection therewith, and receipts and expenditures); § 303 (providing that all agencies of the United States engage in, *inter alia*, the generation of electric energy for ultimate distribution to the public are subject to §§ 301 and 302); § 304(a) (requiring every licensee and public utility to file with the Commission

reports that the Commission may require to include, *inter alia*, information as to generation); § 311 (empowering Commission, for purposes of recommending legislation, to conduct investigations regarding, *inter alia*, generation, however produced, and whether or not subject to the jurisdiction of the Commission).

* * *

[* 24]

Petitioners' rejoinder is a one sentence assertion that "[i]n fact, there is such a nexus because Petitioners limited their petition to dispositions of interstate wholesale generating facilities, which by definition are used for jurisdictional sales." Br. at 24. This statement proves nothing as *any* generation facilities can be used to make jurisdictional sales. The real question is whether the Commission must assert jurisdiction over dispositions of generation facilities under § 203 to regulate wholesale sales made from such facilities. As evidenced by *Mississippi Industries*, [*25] the answer is "no."

* * *

[*27]

Last, Petitioners' reliance on *Hartford*, 131 F.2d 953, is misplaced. As discussed above, the "primary" holding in *Hartford*, that petitioners' contracts, accounts, and other records were "facilities" for interstate wholesale sales subject to Commission jurisdiction, *id.* at 961, is entirely consistent with the Commission's interpretation here and has been followed by the Commission.

Conversely, the "alternative" holding in *Hartford*, 131 F.2d at 961, relied upon by Petitioners, was reject by the Supreme Court in *Connecticut Light*, 324 U.S. at 528-29. In its "alternative" holding, the *Hartford* Court found that viewing the § 201(b) "but" clause as a limitation on the

Commission's jurisdiction over "all facilities" for "the sale ... at wholesale in interstate commerce" was "foolish." *Id.* at 961-62. Rather, the Court read the "but" clause as a "negatively worded confirmation of the Commission's jurisdiction" as if it read "[w]henever it is so specifically provided in Parts II and III, the Commission shall have jurisdiction over the facilities used for generation, for local distribution, for intrastate transmission, etc." *Id.* at 962. Petitioners similarly interpret the "but" clause as a negatively worded confirmation of a broad grant of jurisdiction over generation facilities whenever useful to effectuate the FPA's objectives. Br. at 26 ("Section 201(b)(1) grants FERC [*28] jurisdiction over interstate wholesale generating facilities but limits such jurisdiction to that which is necessary for FERC to carry out the specific regulatory duties set out in FPA Parts II and III, including Section 203.")

The alternative holding in *Hartford* was rejected by the Supreme Court in *Connecticut Light*:

> It is hard for us to believe that Congress meant us to read "shall have jurisdiction" where it had carefully written "but shall not have jurisdiction." The command "thou shalt not" is usually rendered as to forbid and we think here it was employed without subtlety or contortion and in its usual sense. ... So read, its terms seem plainly to state circumstances under which the Commission shall not have jurisdiction. As such it is the provision which loomed importantly in the minds and speech of its sponsors, perhaps was necessary to get the bill passed, and is one which the Commission must observe and the court must enforce.

Connecticut Light, 324 U.S. at 528-29.

The "alternative" conclusion in *Hartford*, that jurisdiction over generation facilities may be exercised under § 201(b) whenever such facilities are used "as aids" to wholesale sales, *see* Br. at 35 (quoting *Hartford*, 131 F.2d at 961), clearly cannot be sustained under the statute. Congress in § 201(b) gave the Commission jurisdiction over facilities for interstate transmission and wholesale sales of electric energy, but then specifically *excepted* generation facilities from that grant of jurisdiction. *See Jersey Central*, 319 U.S. at 72 ("the language of § 201(a) and (b) indicated a distinction between the facilities for generation or production and those for [*29] transmission."); 79 Cong. Rec. 10784 (daily ed. June 28, 1935) (statement of Rep. Lea) ("All facilities so used for transmission and sale are within the jurisdiction of the bill. Certain exceptions are made. One exception is that control shall not apply to facilities used for generation.") Thus, under § 201(b), the Commission has no jurisdiction over generation facilities, whether or not used as "aids" to wholesale sales, unless another provision of the FPA "specifically provides."

* * *

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No. 02-468

In the Supreme Court of the United States

CITIZEN POWER, INC. AND
AMERICAN PUBLIC POWER ASSOCIATION, PETITIONERS

v.

FEDERAL ENERGY REGULATORY COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL ENERGY REGULATORY COMMISSION IN OPPOSITION

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QUESTION PRESENTED

Section 203(a) of the Federal Power Act (FPA), 16 U.S.C. 824b(a), requires public utilities to obtain approval from the Federal Energy Regulatory Commission (FERC) for the disposition of facilities that are subject to FERC's jurisdiction. Section 201(b)(1) of the FPA, 16 U.S.C. 824(b)(1), denies FERC jurisdiction over facilities used for the generation of electric energy, "except as specifically provided" in other provisions of the FPA. The question in this case is whether FERC should have asserted jurisdiction over public utilities' disposition of facilities used only for the generation of electric energy.

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OPINIONS BELOW

The per curiam order of the court of appeals (Pet. App. A1-A3) is not published in the *Federal Reporter*, but is reprinted at 38 Fed. Appx. 18. The orders of the Federal Energy Regulatory Commission (Pet. App. B1-B7, B8-B9) are reported at 94 F.E.R.C. ¶ 61,104 and 95 F.E.R.C. ¶ 61,023.

JURISDICTION

The judgment of the court of appeals was entered on April 25, 2002. Petitions for rehearing were denied on June 21, 2002 (Pet. App. C1-C3). The petition for a writ

of certiorari was filed on September 19, 2002, and docketed on September 23, 2002. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Section 203(a) of the Federal Power Act (FPA), 16 U.S.C. 824b(a), prohibits a public utility from selling, leasing, or otherwise disposing of facilities subject to the jurisdiction of the Federal Energy Regulatory Commission (FERC), unless the public utility first secures an order from FERC authorizing the disposition. Section 201(b)(1) of the FPA, 16 U.S.C. 824(b)(1), provides in pertinent part that FERC "shall have jurisdiction over all facilities" for the transmission of electric energy in interstate commerce and the sale of electric energy at wholesale in interstate commerce, "but shall not have jurisdiction, except as specifically provided in [16 U.S.C. 824-825u], over facilities used for the generation of electric energy."[1] See *New York* v. *FERC*, 122 S. Ct. 1012, 1022-1023 (2002) (discussing Section 201(b)(1)).

2. In February 1999, petitioner American Public Power Association filed a request that FERC issue a declaratory order asserting jurisdiction under Section 203 of the FPA over certain dispositions of generation facilities by public utilities. In February 1999 and July 2000, petitioner Citizen Power, Inc. filed administrative complaints in which it asked FERC to assert jurisdiction over transactions involving generation facilities. See Pet. App. B2.

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[1] Section 201(b)(1) further denies FERC jurisdiction "over facilities used in local distribution or only for the transmission of electric energy in intrastate commerce, or over facilities for the transmission of electric energy consumed wholly by the transmitter." 16 U.S.C. 824(b)(1).

On February 7, 2001, after notice and comment in the declaratory order proceeding and briefing in the complaint proceedings (see Pet. App. B3-B4), FERC declined to assert jurisdiction over the generation-facility transactions and denied petitioners' requests. FERC reasoned that Section 201(b)(1) of the FPA expressly exempts from its jurisdiction "facilities used for the generation of electric energy," and, therefore, such facilities are not facilities subject to FERC's jurisdiction for purposes of Section 203(a). *Id.* at B5. FERC noted that it "has held repeatedly that Section 203 does not apply to dispositions of only generation facilities." *Ibid.* (citing *Duquesne Light Co.*, 84 F.E.R.C. ¶ 61,309, at 62,406 (1998); *Entergy Servs., Inc.*, 51 F.E.R.C. ¶ 61,376, at 62,285-62,286 n.27 (1990); and *United Illuminating Co.*, 29 F.E.R.C. ¶ 61,270, at 61,558 (1984)).

FERC rejected petitioners' argument that, because Section 201(b)(1) grants FERC jurisdiction over "all facilities for [interstate] transmission or sale of electric energy," 16 U.S.C. 824(b)(1), the generation-only facilities are within FERC's jurisdiction for purposes of Section 203. FERC explained that "[t]here is no necessary nexus between the interstate transmission or sale of electric energy," which gives rise to FERC jurisdiction, "and the disposition of a generation facility by itself." Pet. App. B6-B7.

Petitioners requested rehearing. On April 6, 2001, FERC provided notice that it had decided to take no action on petitioners' request, and denied the request by operation of law. Pet. App. B8.

3. On April 25, 2002, the United States Court of Appeals for the District of Columbia Circuit denied a petition for review in an unpublished per curiam decision. Pet. App. A1-A3. The court of appeals determined that FERC's longstanding position declining to

assert jurisdiction over the disposition of generation-only facilities is consistent with the plain language of Sections 201(b) and 203(a), and that FERC "properly found" that its determination not to exercise jurisdiction over the disposition of generation-only facilities is consistent with FERC's statutory jurisdiction over facilities for the interstate transmission or sale of electric energy. *Id.* at A2-A3.

The court of appeals rejected petitioners' argument that FERC must exercise jurisdiction over the disposition of generation-only facilities because of FPA Sections 205 and 206 (16 U.S.C. 824d, 824e), which allow FERC to regulate rates and charges for transmissions and sales of electric energy that are within FERC's jurisdiction. The court explained that although rate regulation under Sections 205 and 206 entails "limited authority to regulate generation facilities under certain circumstances enumerated in [those provisions]," it does not follow that generation facilities are necessarily within FERC's jurisdiction for purposes of Section 203(a) as well. Pet. App. A3. Finally, the court stated that even if the text of the FPA did not foreclose petitioners' arguments, FERC's "longstanding, reasonable interpretation [of the FPA] would be entitled to deference under *Chevron U.S.A., Inc. v. NRDC*, 467 U.S. 837, 843 (1984)." *Ibid.*

ARGUMENT

Section 203(a) of the Federal Power Act, 16 U.S.C. 824b(a), does not specifically address the Federal Energy Regulatory Commission's jurisdiction over the disposition of electric-generation facilities. Rather, Section 203(a) incorporates the jurisdictional limitations of Section 201(b), 16 U.S.C. 824(b). Pursuant to Section 201(b), FERC has for decades declined to exercise

jurisdiction over public utilities' disposition of generation-only facilities. See, *e.g.*, cases cited at Pet. App. B5. The unpublished decision of the court of appeals in this case, which upholds FERC's settled practice, is correct and does not conflict with any decision of this Court or of another court of appeals. Further review therefore is not warranted.

1. Petitioners contend (Pet. 19) that the language in Section 201(b)(1) that grants the Commission jurisdiction over facilities used for wholesale sales of electric energy "plainly includes the generators that create the product being sold." The court of appeals, however, correctly identified a "clear bifurcation" (Pet. App. A2-A3) in Section 201(b)(1) between regulation of facilities for the "transmission or [wholesale] sale of electric energy" in interstate commerce, and regulation of "facilities used for the generation of electric energy." 16 U.S.C. 824(b)(1). As FERC stated in the order under review, and as the court of appeals agreed, the disposition of an electric-generation facility does not necessarily involve a wholesale sale of electric energy. See Pet. App. A3, B6-B7. Thus, the FPA does not require that dispositions of generation facilities, which are expressly excepted from Commission jurisdiction, be regulated as part of FERC's regulation of wholesale sales.[2]

Petitioners also argue (Pet. 20-23) that, because the FPA establishes limited federal authority with respect

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[2] Petitioners assert (Pet. 24) that "[p]ublic utilities that dispose of their interstate generators have, by definition, been engaged in interstate wholesale sales using those facilities." But petitioners do not dispute FERC's determination that "[t]here is no necessary nexus" (Pet. App. A3 (quoting *id.* at B6)) between the disposition itself and a wholesale sale of electric energy in interstate commerce.

to generation facilities for rate-setting purposes, generation facilities also must be subject to FERC's jurisdiction for purposes of Section 203(a). The court of appeals determined (Pet. App. A3) that petitioners' argument is inconsistent with the default rule stated in Section 201(b)(1), which is that FERC lacks jurisdiction over generation facilities unless federal jurisdiction is "specifically provided" in other provisions of the FPA. 16 U.S.C. 824(b)(1). In light of that default rule, the court of appeals concluded that FERC's limited authority to consider generation facilities as part of its regulation of rates for interstate transmission and sales of electric energy under FPA Sections 205 and 206 (16 U.S.C. 824d, 824e) does not render generation facilities themselves broadly "subject to the jurisdiction of the Commission" within the meaning of FPA Section 203 (a), 16 U.S.C. 824b(a). Pet. App. A3. As the court of appeals correctly stated (*id.* at A2-A3), FERC has long interpreted the FPA in this way, and FERC's interpretation, if not actually compelled by the plain language of the FPA, is a reasonable construction of the FPA and therefore is entitled to judicial deference.

2. Petitioners suggest (Pet. 3-7, 12-13) that the court of appeals' decision upholding FERC's settled interpretation of the FPA conflicts with a 1942 decision of the Second Circuit and a decision of the D.C. Circuit itself, which, according to petitioners, this Court has "commended" and "relied upon" (Pet. 12). That argument lacks merit.

The question in *Hartford Electric Light Co.* v. *FPC*, 131 F.2d 953 (2d Cir. 1942), cert. denied, 319 U.S. 741 (1943), was whether a utility that engaged in "the sale of electric energy at wholesale in interstate commerce" within the meaning of Section 201(b)(1), was nevertheless exempt from federal accounting rules because

the company used only its generation facilities (and not any transmission facilities) in interstate commerce. See 131 F.2d at 954-956, 960. The Second Circuit held that the Federal Power Commission had jurisdiction over the utility's accounting under Section 201(b) because the utility's corporate organization, contracts, accounts, and records were "facilities" for interstate wholesale sales and thus subject to federal regulation. *Id.* at 961. Then the court of appeals offered an "alternative ground" (*ibid.*) for its holding: that "the Commission, under § 201(b), has jurisdiction of generation facilities when used in connection with wholesale interstate sales, because jurisdiction of facilities for such sales is 'specifically provided' in [Section 201(b)]." *Id.* at 962. The court of appeals reasoned that Section 201(b)'s provision disclaiming federal jurisdiction over generation facilities operates as a "negatively worded confirmation of the Commission's jurisdiction," and should "be construed as if it read: 'Wherever it is so specifically provided in [the referenced provisions of the FPA], the Commission shall have jurisdiction over the facilities used for generation.'" *Ibid.*

The Second Circuit's alternative holding—that federal jurisdiction extends for certain purposes to generation facilities actually being used in the provision of electricity for a federally regulated transaction—does not answer the question whether FERC's jurisdiction under Section 203 extends to the *disposition* of generation-only facilities. Furthermore, this Court expressly *rejected* the Second Circuit's construction of Section 201(b) in *Connecticut Light & Power Co.* v. *FPC*, 324 U.S. 515, 527-529 (1945), a case on which petitioners also rely (Pet. 4, 12). In *Connecticut Light & Power* the Court considered Section 201(b)'s provision preserving state jurisdiction over local

distribution facilities, which is part of the same sentence as the provision preserving state jurisdiction over generation facilities. See 16 U.S.C. 824(b)(1). The Court found it "hard * * * to believe that Congress meant us to read 'shall have jurisdiction' where it had carefully written 'but shall not have jurisdiction.'" 324 U.S. at 528-529. The Court further noted that the terms of Section 201(b) "seem plainly to state circumstances under which the Commission shall not have jurisdiction." *Id.* at 529. Thus, neither *Hartford Electric Light* nor *Connecticut Light & Power* provides any support for petitioners' assertion of a conflict.

There similarly is no intra-circuit conflict between the D.C. Circuit's decision in this case and its decision in *Mississippi Industries* v. *FERC*, 808 F.2d 1525, vacated in part, 822 F.2d 1104 (D.C. Cir. 1987). In *Mississippi Industries*, the court of appeals affirmed FERC's allocation of the investment costs of a "catastrophically uneconomical" nuclear generation facility among affiliated utilities that used power from the nuclear plant, for purposes of setting their interstate wholesale rates. 808 F.2d at 1528. The court of appeals determined that FERC's allocation of the costs of the nuclear plant did not constitute regulation of the generation facility itself, but rather regulation of "the wholesale rates of interstate sales within [the affiliated utilities'] system" (*id.* at 1544), a matter within FERC's rate-setting jurisdiction under Sections 205 and 206 of the FPA (16 U.S.C. 824d, 824e). *Mississippi Industries* is entirely consistent with the D.C. Circuit's holding in this case (Pet. App. A3) that FERC's rate-setting authority under Sections 205 and 206 constitutes a "limited" jurisdictional grant that does not in itself establish federal jurisdiction over the disposition of generation-only facilities. Accord *Mississippi Power*

& Light Co. v. *Mississippi*, 487 U.S. 354, 383 (1988) (Scalia, J., concurring in the judgment) ("[I]t is reasonable to say that [when FERC sets wholesale rates under Section 206(a), 16 U.S.C. 824e(a),] FERC is not exercising jurisdiction over the electrical generating facility but merely over the sale of the power created by that facility.").

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the D.C. Circuit

REPLY BRIEF OF PETITIONER IN SUPPORT OF WRIT OF CERTIORARI

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REPLY ARGUMENT

Respondent FERC claims that the Judgment below "is correct and does not conflict" with any prior decision of this Court or other appellate court. Brief at 5, 8. Actually, the Judgment directly conflicts with the Second Circuit's decision in *Hartford*[1] and with *Hartford*'s Supreme Court and D.C. Circuit progeny. The conflict is inescapable, and the *Hartford* lineage is correct.

Hartford affirmed a finding by the early Federal Power Commission — by the men who crafted the Federal Power Act — that interstate generators are jurisdictional facilities, making their private owners jurisdictional "public utilities." It further found that because interstate generators are jurisdictional, their disposition triggers FPA § 203.[2] This finding squarely contradicts the ruling here that such dispositions do not trigger § 203.

FERC has never acknowledged the conflict or explained its departure from the *Hartford* lineage. Despite other recent cases where FERC has continued to rely on *Hartford* and its generation holding when convenient,[3] in its order below

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[1] *Hartford Electric Light Co. v. FPC*, 131 F.2d 953 (2d Cir. 1942), *cert. denied*, 319 U.S. 741 (1943).

[2] *Hartford*, 131 F.2d at 963 & n.20 (finding that interstate generators are jurisdictional facilities, and doing so in order to avoid leaving it "undecided whether ... the Commission has authority, with respect to petitioner's generating facilities, under § 203").

[3] *See* Petition at 5-8 (citing cases from the 1980s and 1990s in which FERC reaffirmed its jurisdiction over generation-only facilities).

FERC denied that *Hartford* exists.[4] On brief here (at 7), FERC claims that *Hartford's* § 201 holding "does not answer the question whether FERC's jurisdiction under Section 203 extends to the *disposition* of generation-only facilities." But in fact the Second Circuit specifically found that § 203 *is* triggered. Indeed, it was precisely § 203 that drove the Second Circuit majority, as it sought a § 201 construction that made sense in light of the entire statute, to clarify that sections 201 and 203 do reach those generators that are used for interstate wholesale sales.[5] The Second Circuit answered the very question FERC claims it didn't address.

The Second Circuit's answer is correct. By referring broadly to "the whole of its facilities subject to the jurisdiction of the Commission, or any part thereof [exceeding $50,000]" the plain text of § 203 demands that it reach every kind of facility made jurisdictional by § 201(b). Those types include the subset of generation facilities that enable "the sale of electric energy at wholesale in interstate commerce" — a subset that was small in 1935, but now represents the lion's share. The "but" and "except" clauses of § 201(b)(1) do not place those facilities outside FERC's jurisdiction or outside § 203. As the FPA's 1935 Conference Report explained, the "except" clause was added to clarify that the Commission *does* have jurisdiction over generation

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[4] *See* Petition B-7, B-5 ("Not only does the statutory text support our interpretation [that "Section 203 does not apply to dispositions of only generation facilities"], but there is no precedent, legislative history, or case law which would support a contrary conclusion.").

[5] *Hartford* at 963 n.20.

facilities "to the extent *regulation thereof* is provided for" in succeeding FPA subsections.[6]

As Justice Scalia has pointed out (in concurrence), FPA § 205 is one statutory section that specifically provides for a form of agency authority over generation-related transactions by firms that own interstate generators. *Mississippi Power & Light Co. v. Mississippi ex. rel. Moore,* 487 U.S. 354, 383 (1988). It does so even though FPA § 205 contains no jurisdictional language. FPA § 203 is another such section. Each confers authority to regulate one form of economic transactions involving jurisdictional facilities, and both look to FPA § 201 to delineate which facilities are jurisdictional.

In the opening paragraph of its Argument (at 4), FERC concedes that Congress directed readers to § 201, not § 203, for the delineation of which facilities are jurisdictional and therefore trigger § 203. However, FERC then asserts (at 6) that the "except as specifically provided" clause of § 201(b) creates a "default rule" that requires the reader to return to § 203 and search for a specific reference to jurisdiction over generation — the very subject that FERC (at 4) concedes § 203 "does not specifically address," and handles by directing the reader back to § 201.

The suggested exercise of looking to § 203 (or perhaps cycling interminably between §§ 201 and 203) in search of a jurisdictional delineation is worse than absurd. It contradicts

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[6] Conference Report to Accompany S. 2796, H. Rep. No. 1903, 74th Cong., 1st Sess., 74 (Aug. 23, 1935) (emphasis added), *reprinted at* 79 Cong. Rec. H14621 (Aug. 24, 1935). *See also Mississippi Industries v. FERC,* 808 F.2d 1525, 1543 (explaining legislative history of the except clause), *vacated in other part,* 822 F.2d 1104 (D.C. Cir. 1987).

this Court's holding in *Connecticut Light & Power Co. v. FPC*, 324 U.S. 515, 525 (1945) ("*CL&P*") that the FPA should be construed by first determining which facilities "make their owner a 'public utility'" and then applying all of the FPA's specific regulatory provisions to such utilities, rather than by "exempting from specific regulatory provisions a company found to be a public utility." As this Court explained, the extent of the Act's regulatory authorities "depends on whether the facilities are under the jurisdiction of the Commission; the Commission's jurisdiction does not depend on some independent application of the regulatory provisions." *Id.* at 528.

Perhaps seeing the unacknowledged conflict with *Hartford*, FERC seeks to undermine *Hartford's* authority by asserting (at 7) that this Court "expressly *rejected* the Second Circuit's construction of Section 201(b)" in *CL&P*. But *CL&P* commended *Hartford's* finding that interstate generation is jurisdictional.[7] *CL&P* rejected only the "negatively worded confirmation" logic by which the D.C. Circuit, in that case, had mis-extended *Hartford* to the point of construing 201(b)(1) to reach local distribution — after *Hartford* had found that local distribution is non-jurisdictional, 131 F.2d at 962. *Hartford* (and *CL&P* in commending it) recognized that unlike local distribution, interstate generation is brought within FERC's jurisdiction

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[7] *CL&P* at 528 n.6 (approving *Hartford* for "recogniz[ing the] need for the further step of finding that the generating facilities were used as facilities for interstate wholesale sales, and therefore were within section 201(b)(1)").

by the opening clauses (the first 86 words) of § 201(b)(1).[8] The opening clauses' differential treatment of interstate generation and local distribution is pivotal. It is not erased by FERC's facile implication (at 8) that *CL&P*'s rejection of local distribution jurisdiction extends to generation merely because the remaining language of § 201(b)(1) refers to generation and local distribution within "the same sentence."

Hartford's § 201(b) holding that interstate generation is jurisdictional thus remained good law after *CP&L*. Indeed both FERC and the D.C. Circuit have so found, with this Court's blessing. In the post-*CP&L* case of *Mississippi Industries*, FERC itself relied on *Hartford's* generation jurisdiction holding, as the basis for holding that a generation-only entity is a FERC-jurisdictional public utility. *Middle South Energy, Inc.*, 32 F.E.R.C. ¶ 61,425, at 61,947-48 (1985). In affirming, the D.C. Circuit recognized that *CP&L* "accepts the proposition that FERC may lawfully assert jurisdiction over matters pertaining to generation where it is found that generation facilities are used as facilities for interstate wholesale sales."[9] This Court then relied on the validity of FERC's generation jurisdiction in a related case, *Mississippi Power & Light Co.*, 487 U.S. at 374 & n.13.

By failing to square its ruling here with *Hartford* and the Mississippi cases, FERC has departed without explanation both from its own generation-jurisdiction position and from

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[8] *See* 131 F.2d at 961 (if § 201(b)(1) stopped after 86 words, "it would be obvious that the Commission has jurisdiction over generation facilities when used in connection with interstate wholesale sales").

[9] *Mississippi Industries v. FERC*, 808 F.2d at 1544.

the *stare decisis*[10] federal case law adopting that position. Nor has FERC reconciled its position with the statutory text, which would preclude *Chevron*[11] deference even if this were a matter of first impression. Instead, FERC (at 5) falls back on unintelligible assertions regarding "bifurcation" and "nexus."

Construing the vague "bifurcation" found by the D.C. Circuit below, FERC (at 5) sees a divide "between regulation of facilities for the 'transmission or [wholesale] sale of electric energy' in interstate commerce, and regulation of 'facilities used for the generation of electric energy.'" But it is indisputable and judicially-established that the generators required to produce power for wholesale sales are facilities for wholesale sales.[12] Interstate generators therefore appear on both sides of the asserted "bifurcation."

As to "nexus," FERC suggests (at 5 n.2) that it may regulate a generator disposition only if the disposition has a "necessary nexus" to a wholesale sale. Similarly, FERC asserts (at 8) that FERC's rate setting authority under §§ 205-206 "does not in itself establish federal jurisdiction over the disposition of generation-only facilities." But Congress authorized FERC to apply all of its regulatory authorities, § 203 included, to utilities that own or control jurisdictional facilities. *CP&L*, 324 U.S. at 525. Section 203 jurisdiction does not turn on Section 205; it turns on Section 201. *See CP&L* at 525. *See also* Petition at 23-24.

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[10] *Maislin Industries, U.S. Inc. v. Primary Steel, Inc.*, 497 U.S. 116, 131 (1990).

[11] *Chevron, U.S.A., Inc. v. NRDC*, 467 U.S. 837 (1984).

[12] *See, e.g., Mississippi Industries v. FERC*, 808 F.2d at 1543-45.

CONCLUSION

Congress enacted § 203 to protect against uneconomic consolidations at the heart of the nation's industrial economy. Whether FERC will respect that Congressional enactment now depends on this Court. The petition for writ of certiorari should be granted.

Respectfully submitted,

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